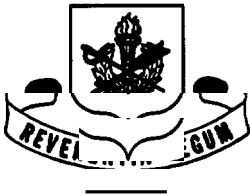


# MILITARY LAW REVIEW



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Charlottesville, Virginia

## MILITARY LAW REVIEW—VOL. 141

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# MILITARY LAW REVIEW

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## THE CIVIL RIGHTS ACT OF 1991: FROM CONCILIATION TO LITIGATION—HOW CONGRESS DELEGATES LAWMAKING TO THE COURTS

MAJOR CHARLES B. HERNICZ\*

### I. Introduction

*In our democracy, there is no last word, no closed issue or final resolution. There is only the next word, a new twist or nuance, plan or idea which displaces our collective understanding of what is the norm and establishes a new standard in its place.*<sup>1</sup>

Nearly thirty years have passed since the civil rights movement of the 1960s brought Americans “equal employment opportunity” through Title VII remedies for employment discrimination based on race, color, religion, sex, and national origin.<sup>2</sup> This promise of race and gender neutrality in employment has evolved with societal

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<sup>1</sup>Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. J.L. REV. 425 (1992).

<sup>2</sup>Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prior version at 42 U.S.C. §§ 2000e-2000e-17 (1988)). See Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 917 (1978) (“The bill passed the Senate on June 17, 1964, by a vote of 76 to 18. On July 2, 1964 . . . , the House of Representatives passed the Senate version of the bill by a vote of 289 to 126. At seven o’clock that evening, President Johnson signed the Civil Rights Act of 1964 in the East Room of the White House.”).

expectations and has become better defined in over a quarter century of application. In the 1991 amendment to Title VII,<sup>3</sup> however, Congress has radically altered the evolution of employment discrimination law and thrust on the courts the task of fostering its ill-conceived creation.

The original intent of Title VII was to remedy personal injustice caused by individual acts of disparate treatment—particularly for blacks.<sup>4</sup> It was hailed as the “MagnaCarta” for black America; inclusion of sex discrimination in Title VII was actually a last moment attempt to defeat the bill in voting.<sup>5</sup> In an address to a joint session of Congress, President Johnson proclaimed, “Their cause must be our cause, too. Because it’s not just Negroes, but it’s really all of us who must overcome the crippling legacy of bigotry and injustice. And, we shall overcome.”<sup>6</sup>

The Civil Rights Act of 1964 (1964 Act) created a new commission, the Equal Employment Opportunity Commission (EEOC), with broad powers and responsibilities for administration and enforcement of the new laws.<sup>7</sup> The 1964 Act required an aggrieved individual to negotiate a series of administrative hurdles beginning with the

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<sup>3</sup>Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

\*See BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2 (2d ed. 1984) (citing S. Rep. No. 91-1137, 91st Cong., 2d Sess. 4 (1970)) (“In 1964, employment discrimination tended to be viewed as a series of isolated and indistinguishable events, for the most part due to ill will on the part of some identifiable individual or organization.”). In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), Chief Justice Burger wrote for the Court that “[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”

<sup>5</sup>See CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 117-19 (1986); see also Richard Fitzpatrick, *The Civil Rights Act of 1991: The Politics of Race*, C742 A.L.I. A.B.A. 191, 192 (1992); Note: *Did She Ask for It?: The “Unwelcome” Requirement In Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1562 (1992) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986)) (“The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . [and thus] we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”). The amendment adding sex discrimination was proposed by Representative Howard Smith of Virginia, Chairman of the House Rules Committee. See *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) (“[The inclusion of ‘sex’] was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act.”) Representative Smith’s plan obviously failed. See generally J. RALPH LINDGREN & NADINE TAUB, THE LAW OF SEXUAL HARASSMENT 110-11 (1988) (“One of the most powerful remedies for sex discrimination available today owes its origin to a misfired political tactic on the part of opponents of the Act.”).

<sup>6</sup>President Lyndon Baines Johnson, Address to a joint session of Congress (Mar. 15, 1965).

<sup>7</sup>Civil Rights Act of 1964, §§ 705-713 (codified at 42 U.S.C. §§ 2000e-4-2000e-12 (1988)).

filing of a "charge" with the EEOC within thirty days of the alleged discriminatory act.<sup>8</sup> The EEOC then was allowed 180 days to investigate and resolve the charges, during which the charging party could not bring suit.<sup>9</sup> An aggrieved person who was not satisfied with the EEOC resolution could file suit only after 180 days had passed, provided that the filing was within ninety days of the EEOC "right to sue" letter.<sup>10</sup>

The Supreme Court extrapolated on the individual rights contained in Title VII to recognize group rights through a "disparate impact" theory of discrimination. In *Griggs v. Duke Power Co.*,<sup>11</sup> the Court recognized that certain "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." This concept became known as "disparate impact" for its disproportionate effect on a recognized minority without intentional discrimination. After years of refinements by the Court, Congress has codified the *Griggs* model of disparate impact analysis, with a few twists, in the Civil Rights Act of 1991 (1991 Act).<sup>12</sup>

<sup>8</sup> 42 U.S.C. § 2000e-5(b) (1988).

<sup>9</sup> *Id.* Because of a backlog of some 120,000 charges that had accumulated at the EEOC by 1975, investigations rarely were begun within the 180 day window. See SCHLEI & GROSSMAN, *supra* note 4, § 21 n.7, n.115 and accompanying text.

<sup>10</sup> 42 U.S.C. § 2000e-5(f)(1) (1988). The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (1972), amended the Civil Rights Act of 1964 to cover federal employees. The procedures involved for federal employees, however, are somewhat different. See 42 U.S.C. 2000e-16 (1988); see also *Wade v. Secretary of the Army*, 796 F.2d 1369 (11th Cir. 1986) (finding that federal employees must exhaust administrative processing requirements of agency before filing suit in federal court). For the current procedures for complaints by federal employees, see 29 C.F.R. §§ 1614.106-110 (1992). A bill proposed by Senator Glenn would radically alter the substance and procedures of discrimination complaints by federal employees. See S. 404, 103d Cong., 1st Sess. (1993) (proposing the "Federal Employees Fairness Act of 1993").

<sup>11</sup> 401 U.S. 424 (1971) (finding a group right of action based on an adverse impact not justified by business necessity, commonly referred to as "disparate impact"); see *infra* section III (discussing disparate impact). *Griggs* applied a rationale established in several earlier district court cases; see, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (finding policy of not hiring any individual with prior arrest unintentional discrimination but in violation of Title VII because blacks arrested with higher frequency than whites and policy not shown to be essential to the safe and efficient operation of the business).

<sup>12</sup> Civil Rights Act of 1991, § 105 (codified at 42 U.S.C. § 2000e-2(k)(1) (1992)); see *infra* section III (additional discussion). Congressional action to "restore" the disparate impact law was prompted by the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Some commentators believe that Congress specifically rejected group theories of liability, such as disparate impact, when it enacted Title VII. See, e.g., HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION* 17 (1991) ("The Civil Rights Act of 1964 was intended to establish color-blind equal employment opportunity through a combination of voluntary compliance, agency conciliation, and judicial enforcement in civil litigation of the per-

Until 1978, the Supreme Court consistently held that the phrase "equal employment opportunity" was to be read literally. It interpreted the law as intending "to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."<sup>13</sup> In a series of decisions beginning with the monumental case of *Regents of University of California v. Bakke*,<sup>14</sup> the Court abandoned its "color-blind" analysis under Title VII and interpreted the law as allowing the voluntary adoption of programs that provided advantages to specific minorities. This policy of "affirmative action" has never been incorporated into Title VII, and its continued validity under the 1991 Act is questionable.<sup>15</sup>

The addition of group protection by disparate impact analysis and creation of voluntary affirmative action programs constituted radical changes to Title VII analysis that eventually became widely accepted and generally understood. The 1991 Act contains, however, a more fundamental, yet not specifically articulated, change in employment discrimination theory—the transformation from an administrative system of remediation to a litigation-oriented cause of action for damages. One of "the most basic and far-reaching" of the 1964 Act's provisions was the emphasis on employer-employee conciliation that was manifested by the law's restrictions on litigation and by enforcement by the EEOC.<sup>16</sup> The 1991 Act shifts the emphasis of Title VII from conciliation with equitable remedies to litigation with tort-like damage awards. Congress made this left turn from the freeway of fundamental civil rights theory without providing a clear indication of direction or even a likely destination. The burden of navigating therefore falls on the already overburdened courts.

The Civil Rights Act of 1991 was an election-year political compromise between a beleaguered Republican White House and a Democratically controlled Congress.<sup>17</sup> Congress passed the Civil Rights Act of 1990 (1990 Act), which was intended to "restore" the law in

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sonal right of individuals not to be discriminated against because of race." The addition of disparate impact in the 1991 Act has made moot these arguments.

<sup>13</sup>Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 642 (1987) (Stevens, J., concurring).

<sup>14</sup>438 U.S. 265 (1978).

<sup>15</sup>See *infra* section IV (discussion of affirmative action).

<sup>16</sup>Francis J. Vaas, *Title VIII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 452 (1966); see also Note, *Protection from Employer Retaliation: A Suggested Analysis for Section 704(a)*, 65 Va. L. Rev. 1116, 1155 n.2 and accompanying text (1979) ("Title VII places major responsibility for enforcing compliance with its policies, through either formal or informal conciliation, on the individual complainant.").

"CHARLES A. SULLIVAN, ET AL., SPECIAL RELEASE ON THE CIVIL RIGHTS ACT OF 1991, EMPLOYMENT DISCRIMINATION xi-xii (1992) [hereinafter SPECIAL RELEASE].

six specific Supreme Court cases decided in the 1988 term.<sup>18</sup> When it failed to muster the votes to override President Bush's veto of the 1990 Act,<sup>19</sup> Congress reconsidered a slightly modified version of the 1990 Act in 1991.<sup>20</sup>

The controversy surrounding the Clarence Thomas Supreme Court confirmation debate and hearings caused the Bush Administration to become far more amenable to compromise.<sup>21</sup> Members of Congress who had extended and embarrassed themselves in the hearings also were looking for an opportunity for redemption.<sup>22</sup> The same members of Congress and the Administration who had closed their eyes and minds to a case of sexual harassment by a proposed Supreme Court Justice now were scrambling to establish greater protections for victims of such harassment.<sup>23</sup> Frenzied negotiations culminated in what many call the "Anita Hill Civil Rights Act of

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<sup>18</sup> H.R. 4000, S. 2104, 101st Cong., 2d Sess. (1990). The cases are *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (construing 42 U.S.C. § 1981 not to cover on-the-job racial harassment); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (placing the burden of proof on plaintiff in a disparate-impact claim under Title VII to show lack of business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (shifting burdens of proof and limiting liability in mixed-motive claim under Title VII); *Lorance v. A.T.&T. Technologies, Inc.*, 490 U.S. 900 (1989) (determining accrual of Title VII action against allegedly unlawful seniority system); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting collateral attack against a consent decree containing an affirmative action plan); and *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (finding intervenors not liable for attorneys' fees in Title VII action). The 1990 Act also would have reversed or modified several other Supreme Court decisions. See Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 & n. 11 (1991) (total of 10 cases affected by 1990 Act).

<sup>19</sup> President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632-34 (Oct. 22, 1990), reprinted in 136 CONG. REC. S16,457-58 (daily ed. Oct. 22, 1990); 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990) (reporting Congress failed to override veto of civil rights law).

<sup>20</sup> 137 CONG. REC. H53 (daily ed. Jan 3, 1991) (noting its introduction as H.R. 1, 102d Cong., 1st Sess. (1991)).

<sup>21</sup> See David Louter, *Rush of Events Broke Rights Bill Impasse*, L.A. TIMES, Oct. 26, 1991, at A1.

<sup>22</sup> See, e.g., Mitchell Locin, *Senate's Frayed Image May Help Rights Bill*, CHI. TRIB., Oct. 17, 1991, at 12 ("Ever since professor Anita Hill's allegations against Thomas raised the issue of sexual harassment to the peak of public attention, senators have been tripping over themselves in a rush to express abhorrence of such behavior.").

<sup>23</sup> Under the Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. 1981a (1992)), a victim of sexual harassment now can recover limited compensatory and punitive damages—even when no adverse employment action has been taken. See *infra* section V (discussion of damages under the 1991 Act); see also Peter M. Panken & Michael Starr, *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked*, R176 A.L.I. A.B.A. 813 (1992); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1299 (1992) ("[Clarence Thomas'] claim was not necessarily believed by the public, and since public opinion in favor of Thomas almost perfectly tracked disbelief in Anita Hill, the vote seems to have been decided by the ability of Senate Republicans to attack her.") (citations omitted).

1991,'<sup>24</sup> a bill that reaches well beyond mere "restoration" of prior law.<sup>25</sup>

The 1991 Act lacks both vision and direction. Its amendments fail to recognize that discrimination is systemic, pervasive, and generally without motive. Instead, the amendments emphasize a plaintiff's chances of winning a judgment, increasing recovery of damages, and litigating without risk of cost. The amendments state a preference for race and minority consciousness instead of color blindness, individual relief instead of class improvement, and unequal treatment as a means to achieve "equal" opportunity.<sup>26</sup>

The 1991 Act includes changes in diverse areas of employment discrimination law. Among the more substantial changes are the following:

- Extending the coverage of 42 U.S.C. § 1981 to the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship";<sup>27</sup>
- Compensatory and punitive damages, and jury trials to determine the amount of damages, in cases of intentional discrimination;<sup>28</sup>
- Codification of the disparate impact analysis, under which an employer must "demonstrate" that a challenged employment practice is "job related for the position in question and consistent with business necessity";<sup>29</sup>

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<sup>24</sup>See SPECIAL RELEASE, *supra* note 17, at xii; see also Martha R. Mahoney, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1283 (1992); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 974 (1992) ("Justice Thomas' race and ideology accounted for his nomination. . . . The Thomas nomination reflected President Bush's general political approach to civil rights: The President hoped to mollify many whites dissatisfied with affirmative action through his opposition to the Civil Rights Act of 1991.").

<sup>25</sup>See David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, C742 A.L.I. A.B.A. 1, § I. (1992).

<sup>26</sup>See James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L.J. 133, 170 (1992).

<sup>27</sup>Civil Rights Act of 1991, § 101, *overruling* *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

<sup>28</sup>Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a (1992)). Previously compensatory and punitive damages and jury trials were available only for race and ethnic discrimination claims under 42 U.S.C. § 1981 (1988).

<sup>29</sup>Civil Rights Act of 1991, § 105 (codified at 42 U.S.C. § 2000e-2(k)(1) (1992)).

- Prohibition of “race-norming”—the practice of adjusting test scores based on race or other factors prohibited by Title VII;<sup>30</sup>
- Allowance of injunctive and declaratory relief, attorney’s fees, and costs in “mixed motive” cases, even when the employer demonstrates it would have taken the same action without a prohibited “motivating factor” based on race, color, religion, sex, or national origin;<sup>31</sup>
- Extraterritorial application for American citizens working in a foreign country for an American employer or a foreign company “controlled by an American employer”;<sup>32</sup>
- Allowance of “expert fees” in awards of attorney’s fees;<sup>33</sup> and
- Definition of the period for challenging an intentionally discriminatory seniority system.<sup>34</sup>

Each of these areas encompasses multiple issues and ambiguities; this article could not possibly address them all in detail. This article instead will focus on the areas that likely will cause the most controversy and, thereby, the most litigation: disparate impact law, race-norming, mixed motive issues, affirmative action, and remedies and jury trials. The 1991 Act amends employment discrimination law in these areas but fails to define the terms, concepts, and goals of the amendments. Through this failure, Congress has delegated to the courts authority to shape and “make” the new law.

The first area covered in this article is, however, one not specifically contained in the 1991 Act. Congress had included a very specific provision in previous bills, but omitted it from the final 1991 Act.<sup>35</sup> This particular delegation by omission of lawmaking from Congress to the courts already has inspired hundreds of suits and has wasted tens of thousands of attorney and court productive hours. The issue is retroactivity, or when the 1991 Act became effective.

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<sup>30</sup> *Id.* § 106 (codified at 42 U.S.C. § 2000e-2(l) (1992)).

<sup>31</sup> *Id.* § 107 (codified at 42 U.S.C. § 2000e-2(m) (1992)).

<sup>32</sup> *Id.* § 109 (codified at 42 U.S.C. § 2000e-1(a) (1992)), *overruling* E.E.O.C. v. Arabian American Oil Co., 111 S. Ct. 1227 (1991).

<sup>33</sup> Civil Rights Act of 1991, § 113 (codified at 42 U.S.C. § 2000e-5(k) (1992)).

<sup>34</sup> *Id.* § 112 (codified at 42 U.S.C. § 2000e-5(e)(2) (1992)), *overruling* Lorange v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

<sup>35</sup> The vetoed Civil Rights Act of 1990 and the original House version of the 1991 Act contained very specific language on the effective date. *See infra* notes 64-65 and accompanying text.

## II. Retroactivity

*To this end it is that men give up all their natural power to the society they enter into, as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature.<sup>36</sup>*

*John Locke*

No comment on the Civil Rights Act of 1991 would be complete without analyzing the retroactivity issue.<sup>37</sup> This single issue already has caused an avalanche of litigation in the federal courts;<sup>38</sup> every district court probably will hear the issue eventually.<sup>39</sup> It also has been a ripe issue for in-depth, although at times misguided, analysis and comment.<sup>40</sup> In their attempts to find the "congressional intent" of the 1991 Act, many courts and commentators have paid insufficient attention to the obvious—Congress actually "intended" to leave the issue to the courts!<sup>41</sup>

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<sup>36</sup> JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government*, in *SOCIAL CONTRACT* 80 (1977).

<sup>37</sup>A "retroactive" law is one that takes away or impairs a vested right under existing law, imposes a new duty, or creates a new obligation involving past acts or transactions. A "retrospective" law affects acts or facts that occurred before it came into force but also can take away or impair vested rights. BLACK'S LAW DICTIONARY 1184 (5th ed. 1979). The obvious overlap in definition has led the courts and commentators to consistently refer to the "retroactive" application, although the controversy in certain aspects of the 1991 Act involve its retrospective application.

<sup>38</sup>Seven circuit courts of appeals have heard the retroactivity issue; six concluded that the 1991 Act does not apply retroactively and one that it does. Those cases finding prospective application only are: *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992); *Vogel v. City of Cincinnati*, 969 F.2d 594 (6th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992). Only one circuit court has applied the Act retroactively: *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1556 (9th Cir. 1992), in which the Ninth Circuit concluded "that Congress intended the courts to apply the Civil Rights Act of 1991 to cases pending at the time of its enactment and to pre-Act conduct still open to challenge after that time."

<sup>39</sup>See Cathcart and Snyderman, *supra* note 25, § XI. See also *Fray*, 960 F.2d at 1382-83 (Appendix contains an impressive list of district courts that have already heard the issue).

<sup>40</sup>See, e.g., Michele A. Estrin, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992) (capably arguing for prospective application but concluding, apparently based on personal emotion, that the 1991 Act should apply retroactively to all cases); David Allen, Comment, *Retroactivity of the Civil Rights Act of 1991*, 44 BAYLOR L. REV. 569 (1992) (finding that the 1991 Act should apply prospectively).

<sup>41</sup>Senator Kennedy, the chief democratic sponsor of the original bill, stated that "[i]t will be up to the courts to determine the extent to which the bill will apply to

### A. A Tale of Two Presumptions

The retroactivity controversy revolves around two Supreme Court precedents that many perceive as contradictory.<sup>42</sup> Proponents of retroactive application cite *Bradley v. Richmond School Board*,<sup>43</sup> in which the Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Supporters of nonretroactivity believe *Bowen v. Georgetown University Hospital*<sup>44</sup> is the appropriate precedent. In *Bowen*, the Court held that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."<sup>45</sup> Lower courts have cited one, both, or a combination of rationales in interpreting the 1991 Act.<sup>46</sup>

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cases and claims that are pending on the date of enactment." 137 CONG. REC. S15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy). One district court aptly described the issue when it stated "Congress in this new civil rights legislation punted on the question of whether or not the Act applies retroactively." *King v. Shelby Medical Ctr.*, 779 F. Supp. 157, 165 (N.D. Ala. 1991). See *Fray*, 960 F.2d at 1379 ("A majority of Congress favored retroactivity, but retroactive legislation carried the risk of another presidential veto. Congress therefore deliberately left the Act retroactivity neutral, reserving the issue for the courts to decide."); Estrin, *supra* note 40 at 2065 ("On the issue of the Civil Rights Act's retroactive applicability, Congress clearly and knowingly left a gap in the statute."); *Cook v. Foster Forbes Glass*, 783 F. Supp. 1217, 1219 (E.D. Mo. 1992) ("If anything, the legislative history of the Act shows merely that Congress decided not to decide.").

<sup>42</sup> See, e.g., Ellen M. Martin, et al., *Recent Developments in Sexual Discrimination*, 441 P.L.I. LIT. 647, 692 (1992) ("Courts have experienced difficulty in interpreting the Act because the language of the statute is ambiguous, a clear indication of congressional intent cannot be deciphered, and an apparent tension exists in Supreme Court precedent regarding retroactive application of a new statute.").

43416 U.S. 696, 711 (1974). *Bradley* cited as authority *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801), where the Court enforced a treaty with France that required restoration of property "not yet definitively condemned." Chief Justice Marshall wrote for the Court in finding that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110.

44488 U.S. 204 (1988). *Bowen* followed a long line of precedents disfavoring retroactive application of laws. See, e.g., *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retroactive operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."); see also Elmer Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1935).

<sup>45</sup> *Bowen*, 488 U.S. at 208.

<sup>46</sup> Compare *Van Meter v. Barr*, 778 F. Supp. 83, 85 (D.D.C. 1991) (applying the *Bowen* presumption against retroactivity) with *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992) (finding the Act retroactive under *Bradley*). The *Van Meter* court also found that the plaintiff, an FBI agent, had not raised the issue of compensatory damages in the administrative phase of his complaint. Because the Title VII waiver of sovereign immunity for suits against the United States is conditioned on raising all substantive matters in an administrative complaint, the plaintiff had failed

The Supreme Court recently sidestepped an opportunity to reconcile *Bradley* and *Bowen*. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,<sup>47</sup> the Court recognized the "apparent tension" between the two cases but found that reconciling the cases was unnecessary. Justice O'Connor, writing for a majority, held that congressional intent was clear on the face of the postjudgment interest law involved in the case and further analysis was unnecessary.<sup>48</sup> Justice Scalia concurred in the decision, but castigated the majority for its failure to overturn *Bradley*, which he viewed as an aberration.<sup>49</sup>

The circuit courts of appeal generally have reached the same conclusion on the retroactivity issue by many different avenues of analysis. The Eighth Circuit found an overall legislative intent to apply the 1991 Act only prospectively;<sup>50</sup> it therefore reached the same conclusion, regardless of whether it applied the *Bowen* or the *Bradley* test. The Seventh Circuit found the legislative history unhelpful and applied the *Bowen* presumption after a thorough analysis of possible consequences.<sup>51</sup> The Eleventh Circuit found the 1991 Act prospective only under either test.<sup>52</sup> The Ninth Circuit based its retroactive application of the 1991 Act on maxims of statu-

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to exhaust administrative remedies. 778 F. Supp. at 85. When it decided *VanMeter*, the D.C. District Court had 332 Title VII suits pending, most of which involved federal employees. *Id.* at 83.

47494 U.S. 827, 837 (1990).

<sup>48</sup>*Id.* ("[U]nder either [the *Bradley* or *Bowen*] view, where the congressional intent is clear, it governs.").

<sup>49</sup>*Id.* at 857. (Justice Scalia wanted to apply "the clear rule of construction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."). Justice Scalia is well known for his disdain of legislative history in favor of the textualist—or clear-meaning—approach to statutory interpretation. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring); *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring). For reviews and critiques of Justice Scalia's position, *see* WILLIAM N. ESKRIDGE, JR., & PHILLIP P. FRICKEY, *LEGISLATION: STATUTES AND CREATION OF PUBLIC POLICY* 650–84 (1988) (reviewing Justice Scalia's adherence to textualism); Nicolas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1310–35 (critiquing textualism with emphasis on Justice Scalia). Justice Scalia's support of textualism is based on "notions of fairness because parties should only be held accountable for the laws at the time of their conduct." *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 935 (7th Cir.), *cert. h i e d*, 113 S. Ct. 324 (1992).

<sup>50</sup>*Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992), *cert. h i e d*, 113 S. Ct. 1430 (1993).

<sup>51</sup>*Mozee*, 963 F.2d at 937–38.

<sup>52</sup>*Baynes v. AT&T Technologies, Inc.*, 970 F.2d 1370, 1375 (11th Cir. 1992) ("[T]his case has been litigated for two and one-half years through a non-jury trial on the merits, all in reliance on prior law. In circumstances like these, we conclude that the effect of the statutory change [allowing jury trials] strongly mitigates against retroactivity.").

tory construction without use of either presumption.<sup>63</sup> The divergence of analyses among these courts indicates, at the least, that Congress made itself less than perfectly clear on the issue of effective date.

### *B. Only Two Ways to go Here?*

An alternative "principled approach" analysis would avoid the *Bradley-Bowen* entanglement.<sup>64</sup> This theory requires courts first to determine whether the statute at issue "implicates any of the dangers of retroactivity," such as unsettling expectations, depriving parties of notice, or targeting vulnerable groups.<sup>65</sup> If these factors are present, the court should decline to apply the law retroactively.

The author of the principled approach test justifies retroactive application of the 1991 Act because the 1991 Act "restores" expectations; employers were "on notice" that prior Supreme Court decisions in the area were controversial and have no "entrenched right to preserve particular remedies" in a regulated area; the 1991 Act applies equally to all employers, who played an integral role" in shaping the Act; and employers, not plaintiffs, should bear the burden of congressional inaction.<sup>66</sup> This position is, however, factually inaccurate and conceptually misguided.

**1. Factual Objections.**—The overriding theme in the principled approach is the 1991 Act's "restoration" of preexisting laws. None of the stated purposes of the 1991 Act is to "restore" a disputed Supreme Court decision,<sup>67</sup> and the amendments in the 1991 Act "go

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<sup>63</sup>*Davis v. City and County of San Francisco*, 976 F.2d 1536, 1551 (9th Cir. 1992), cert. denied, 114 S. Ct. 602 (1993); see *infra* notes 93-95 on the use of negative inferences.

<sup>64</sup>*Estrin*, *supra* note 40, at 2065-77. This approach is similar to the *Bradley* "manifest injustice" test and also requires full adjudication of each case to reach a conclusion. For another approach see what Professor Friedman refers to as the "Bennett reconciliation" in Leon Friedman, *The Civil Rights Act of 1991: Procedural Issues: Retroactivity, Changes in Procedures for Attacking Consent Decrees and Seniority Systems; New Limitations Periods*, C742 A.L.I. A.B.A. 1073 (1992) (analyzing the 1991 Act based on *Bennett v. New Jersey*, 470 U.S. 632 (1985), which distinguishes between merely procedural and substantive changes in the law). Many courts have flatly rejected a case-by-case analysis for substantive v. procedural issues. See, e.g., *Moze*, 963 F.2d at 940 ("[I]t may cause undue confusion to require a trial court to conduct a provision-by-provision analysis of an act in order to distinguish between those provisions regulating procedure and damages and those provisions that affect substantive rights and obligations.").

<sup>65</sup>*Estrin*, *supra* note 40, at 2069.

<sup>66</sup>*Id.* at 2076-77.

<sup>67</sup>Civil Rights Act of 1991, § 3(2) ("[T]o codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).").

much further than merely restore a pre-1989 status quo."<sup>58</sup> The one case specifically reversed in the Act, *Wards Cove Packing Company v. Atonio*,<sup>59</sup> is specifically exempted from retroactive application of the new law.<sup>60</sup> Several of the 1991 Act's other provisions are not only "new law," but also vast departures from the original policies of Title VII.<sup>61</sup> The author of the reasoned judgment theory perhaps began her analysis based on the retroactivity and restoration language in the Civil Rights Act of 1990.<sup>62</sup> Both that vetoed Act<sup>63</sup> and the House version of the 1991 Act contained explicit guidance on when various provisions were to become effective.<sup>64</sup> One of the

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<sup>58</sup> CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION-1992 SUPPLEMENT § 2 (2d ed. 1992) [hereinafter 1992 Supplement].

<sup>59</sup> 490 U.S. 642 (1989).

<sup>60</sup> Civil Rights Act of 1991, § 402(b). See *supra* note 12 and accompanying text.

<sup>61</sup> See *supra* notes 2-6 and accompanying text; see also SPECIAL RELEASE, *supra* note 17, at viii ("Even where the new statute attempts to codify the pre-1989 law, it often introduces subtleties and variations that will play an important role in the future."); *United States v. Burke*, 112 S. Ct. 1867, 1887 (1992) ("[T]he circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well.") (holding that Title VII backpay awards are not excludable from gross income as are tort damages); 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991 (statement of Rep. Hyde) ("Not only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402, but it would be extremely unfair. . . . defendants in pending litigation should not be made subject to awards of money damages of a kind and an amount that they could not possibly have anticipated prior to the time suit was brought against them.")).

<sup>62</sup> H.R. 4000, S. 2104, 101st Cong., 2d Sess. (1990).

<sup>63</sup> H.R. 1, 102d Cong., 1st Sess. (1991), *reprinted in* 137 CONG. REC. H3922, H3925 (daily ed. June 5, 1991). The President actually has no authority to "veto" legislation under the Constitution. Under Article I, Section 7, the President must "approve and sign" a bill or return it to the House where it originated with his "objections." That House must "proceed to reconsider" the bill in light of these "objections" and both Houses must approve the law by two-thirds despite the President's "objections." U.S. CONST. art. I, § 7.

<sup>64</sup> H.R. 1, 102d Cong., 1st Sess. § 213 (1991), *reprinted in* 137 CONG. REC. H3922-H3925 (daily ed. June 5, 1991) applied effective dates of the Act based on the date of the Supreme Court decision being "restored." This section provides as follows:  
SEC. 213. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

a) APPLICATION OF AMENDMENTS.—The amendments made by—

- (1) section 202 shall apply to all proceedings pending on or commenced after June 5, 1989;
- (2) section 203 shall apply to all proceedings pending on or commenced after May 1, 1989;
- (3) section 204 shall apply to all proceedings pending on or commenced after June 12, 1989;
- (4) sections 205(a)(1), 205(a)(3), 205(a)(4), 205(b), 206, 207, 208, and 209 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;
- (5) section 205(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and
- (6) section 210 shall apply to all proceedings pending on or commenced after June 15, 1989.

reasons President Bush cited for his veto of the 1990 bill was the “unfair retroactivity rules.”<sup>65</sup> These bills also specifically stated they were intended to “restore” law from several Supreme Court cases.<sup>66</sup> The 1991 Act contains no such restoration language.<sup>67</sup>

Discrimination suits commonly languish in the federal courts for years or even decades.<sup>68</sup> Considering a legislative change to the law during the life of such a suit **as** “restoring” rights that did not exist at the time of the conduct is hardly fair.<sup>69</sup> Congress seldom

(b) TRANSITION RULES.—

(1) IN GENERAL.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 202, 203, 205(a)(2), or 210, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 204.—Any orders entered between June 12, 1989, and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 204, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 204, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered **as** that individual had on June 12, 1989.

(c) PERIOD OF LIMITATIONS.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 202, 203, 205(a)(2), or 210.

<sup>65</sup> 136 CONG. REC. S16,562 (daily ed. Oct 24, 1990).

<sup>66</sup> One of the stated purposes of the 1990 Act and the original 1991 bill was to “respond to the Supreme Court’s recent decisions **by restoring** the civil rights protections that were dramatically limited by those decisions.” H.R. 1, 102d Cong., 1st Sess. § 2(b)(1) (1991), **reprinted in** 137 CONG. REC. H3922, H3925 (daily ed. June 6, 1991) (emphasis added).

<sup>67</sup> Statutory changes that are remedial in nature or simply restore rights generally will **be** applied retroactively, while substantive changes will not. *See, e.g.*, *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 (11th Cir. 1992); 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

<sup>68</sup> *See, e.g.*, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) (“The length of litigation in complex Title VII . . . [cases] often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial Paleolithic museum piece.”).

<sup>69</sup> In *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1539–40, the only circuit court decision applying the 1991 Act retroactively, the alleged discrimina-

responds to court decisions with legislation.<sup>70</sup> The only certainty parties to litigation can have is not through some vague hope of congressional "restoration" or creation of rights, but rather by application of the law in effect at the time the acts occur.<sup>71</sup>

To judge action on the basis of a legal rule that was not even in effect when the action was taken, . . . is not really . . . about 'justice' at all, but about mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result. A rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion giving judges power to expand or contract the effect of legislative action.<sup>72</sup>

Most employers probably were unaware that they had specific interests involved when the provisions of the 1991 Act were being drafted.<sup>73</sup> Radical changes and compromises in the bill's language

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tory acts occurred in 1978—13 years before the "restoration" of the law in the Civil Rights Act of 1991. The original suit in *Wards Cove* was filed in 1974! The court in *Mozee* rebutted a fairness argument for retroactive application of the 1991 Act: "It is far from clear that the equities in this case favor a retroactive application of the 1991 Act. We must remember that this case has been in litigation over fifteen years. A remand under a new statute after fifteen years of litigation seems anything but just." *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 938 (7th Cir. 1992).

<sup>70</sup> See Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 444-45 (1983) (reporting that among all the bills involving federal labor or antitrust issues from 1950 to 1972, 176 were proposed to alter 27 Supreme Court decisions and only nine were enacted into law—nine changes in 22 years in both labor and antitrust).

<sup>71</sup> Congressional overturns of Supreme Court decisions increased somewhat in the 1980s. See generally William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 616-17 (1991); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions*, 101 YALE L.J. 331, 377-89 (1991). Such reversals are still fairly rare, however, despite routine monitoring of Court decisions by both House and Senate Judiciary Committees. See Solimine & Walker, *supra* note 1, at 430-48 (reviewing the process of and trends in congressional response to Supreme Court decisions).

<sup>72</sup> *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990) (Scalia, J., concurring).

<sup>73</sup> The compromise between Republicans and Democrats that led to the 1991 Act was completed and signed into law on November 21, 1991—just over 30 days following the Clarence Thomas confirmation. This frenzied exchange left little time for anyone other than close insiders to take any part in the process. See Forman, *supra* note 26, at 199 ("Indeed, final testament to the impact of the Thomas/Hill hearings on the process was the speed with which the Senate took the virtually unprecedented steps of applying the civil rights law to members of Congress and providing that individual Senators, not the taxpayers, would be liable for the damages.").

continued until virtually the day Congress voted on the bill.<sup>74</sup> The one employer that did benefit from the 1991 Act, despite vehement opposition, was the Wards Cove Packing Company.<sup>75</sup> It paid a Washington lobbying firm over \$175,000 over two years and enlisted both Alaskan senators to fight for its exemption from the Act.<sup>76</sup> Wards Cove Packing Company is, however, the “exceptional exception” to the rule of employer involvement in the 1991 Act, and Congressional sponsors still are trying to reverse its special exception.<sup>77</sup>

The 1991 Act applies to all “employers,”<sup>78</sup> including federal agencies,<sup>79</sup> which seldom have input into Congress during pending legislation. Most employers simply do not have the money, political connections, or immediate litigation interest of a Wards Cove Packing Company.<sup>80</sup> Concluding that most employers in the United States were on notice of Congress’s intent or “integrally involved” in negotiating the terms of the 1991 Act is fanciful and naïve.<sup>81</sup>

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<sup>74</sup>The version of the bill that the Senate finally approved, S. 1745, 102d Cong., 1st Sess. (1991) (enacted), was a frenetic compromise between House and Senate sponsors. *See, e.g.*, 137 CONG. REC. H9510 (daily ed. Nov. 7, 1991) (statement of Rep. Dreier) (“As we rush to ratify . . . the compromise settlement that has been reached between the parties who negotiated it, we have created a lack of symmetry between remedies.”).

<sup>75</sup>The Wards Cove Packing Company had been involved in defending a discrimination suit in federal court for over a decade. *See* section III, *infra* (discussion of disparate impact and *Wards Cove* before Supreme Court and how 1991 Act overturned law of case but exempted packing company from effects of the law).

<sup>76</sup>*See* 137 CONG. REC. H9555 (daily ed. Nov. 7, 1991) (statement of Rep. Faleomavaega); *see also Civil Rights for Some—Stealthy Amendment Sells Out Cannery Workers*, SEATTLE TIMES, Nov. 4, 1991, at A1 (“Senate Republicans managed to slip in a one-sentence amendment that would exempt the parties involved in *Wards Cove Packing Co. v. Atonio*, the very Supreme Court decision the new act is intended to overturn. . . . Fair is fair. This kind of lawmaking stinks.”).

<sup>77</sup>Congressman McDermott has sponsored a bill entitled the “Justice for Wards Cove Workers Act” that would delete the special Wards Cove exception. H.R. 1172, 103rd Cong., 1st Sess. (1993).

<sup>78</sup>Section 701(b) of the Civil Rights Act of 1964, as amended (codified at 42 U.S.C. § 2000e(b) (1992)), defines the term “employer” as:

<sup>79</sup>*See* 42 U.S.C. § 2000e-16(a) (1992) (applying the Civil Rights Act to employees and applicants of military departments and executive agencies, the Postal Service and Postal Rate Commission, the Government of the District of Columbia, and the competitive service employees in the legislative and judicial branches and the Library of Congress).

<sup>80</sup>*See, e.g.*, *Equal Employment Opportunity Comm’n v. Consolidated Serv. Sys.*, 989 F.2d 233, 235–36 (7th Cir. 1993). (“Consolidated is a small company. . . . [T]he company’s annual sales are only \$400,000. We mention this fact not to remind the reader of David and Goliath, or to suggest that Consolidated is exempt from Title VII (it is not), or to express wonderment that a firm of this size could litigate in federal court for seven years (and counting) with a federal agency, but to explain why [the company recruits employees by word of mouth]).

<sup>81</sup>The author recognized that businesses were at odds with one another over provisions in the 1991 Act. *See* Estrin, *supra* note 40, at 2076 n.266.

**2. Conceptual Breakdown.**—Many examples of laws that place the burden of retroactive application on the employer exist.<sup>82</sup> Such laws, unlike the 1991 Act, clearly state their retroactive application.<sup>83</sup> Courts have no difficulty interpreting consistently such a clear statement from Congress. The difficulty arises when courts are asked to interpret internally conflicting provisions such as those in the 1991 Act, or to distinguish between “substantive” and “procedural” changes in a law.<sup>84</sup>

The author of the principled approach theory naively concludes that “application of the Act to pending cases best achieves fairness and efficiency.”<sup>85</sup> In her estimation, employers “fairly” may shoulder the costs of “congressional inaction” and imposing the costs on employers is efficient because it facilitates the application of the new law immediately instead of “belaboring interpretations that Congress rejected.”<sup>86</sup> These conclusions are loosely reasoned and impossible to justify based on any reasonable judgment.

Approximately 10,000 suits are currently pending under Title VII.<sup>87</sup> Applying the principled approach test to these cases would lead courts to reach anomalous conclusions under the same law. In some cases, the absence of “dangers of retroactivity” would justify applying the 1991 Act retroactively; in others, “unsettling expectations” would require prospective application. Little fairness arises from a process in which parties are not able to rely on previous precedent from the same court under the same law. Applying the

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<sup>82</sup> *Id.* at 2077.

<sup>83</sup> *See, e.g.*, Federal Home Loan Bank Act, 12 U.S.C. § 1439a (1992) (all monies deposited pursuant to the statute shall be available “retroactively as well as prospectively”); Black Lung Benefits Act, 30 U.S.C. § 945(a)(1) & (c) (1992) (providing for processing of benefit claims “pending on, or denied on or before” the effective date and awarding benefits “on a retroactive basis”); *see also* *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 228 (7th Cir. 1992) (“A legislature has awesome power uncabined by a professional tradition of modesty and this power is held a little in check by the presumption that its handiwork is to be applied only to future conduct.”).

<sup>84</sup> Even a so-called “procedural” alteration of available remedies can have a substantive effect on the parties. *See, e.g., Luddington*, 966 F.2d at 229 (“But many of us would squawk very loudly if people with unpaid parking tickets were made retroactively liable to life imprisonment.”) (Posner, J.); *see also Gersman*, 975 F.2d at 898-99 (“[W]e agree with the Fifth Circuit that the Bradley presumption of applicability of law as of the time of decision must pertain to ‘remedial provision[s]—not substantive obligations or rights under a statute.’”) (citation omitted).

<sup>85</sup> *Estrin*, *supra* note 40, at 2076-77. This analysis draws from the “manifest injustice” analysis of *Bradley*, discussed *supra* at notes 43-45, but ignores Justice Scalia’s powerful objection to this analysis: it transforms a rule of law into a rule of judicial discretion, “giving judges power to expand or contract the effect of legislative action.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990).

<sup>86</sup> *Estrin*, *supra* note 40, at 2077.

<sup>87</sup> 2 D.O.J. ALERT No. 5, 8 (1992) (reporting statistics from Michael Selmi of the Lawyer’s Committee for Civil Rights Under Law).

principled approach test also would require courts to take evidence in each of the 10,000 cases to determine whether the “dangers of retroactivity” are present. Such a burden on every court in the land hardly promotes efficiency.<sup>88</sup>

Other commentators have analyzed the retroactivity issue from a less idealistic approach than the principled approach analysis. A common observation is that “Congress deliberately employed ambiguous language in drafting the act for their own political gain in order to skirt the controversial retroactivity issue.”<sup>89</sup> A brief look at the statutory language shows just how successful Congress was in making the retroactivity language ambiguous.

### C. Statutory *Language* and Interpretation

Section 109 of the 1991 Act is entitled “Effective Date,” and states that “Except **as** otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.”<sup>90</sup> This section is a tribute to ambiguous draftsmanship, leading one circuit court to outline the multiple possible interpretations embraced by this language:

it might mean that the 1991 Act applies to conduct which occurred after the enactment, it might mean that the Act applies to all proceedings beginning after the enactment, it might mean that the Act’s provisions apply to all pending cases at any stage of the proceedings, or it might mean that the Act’s procedural provisions apply to proceedings begun after enactment and the substantive provisions apply to conduct that occurs after the enactment.<sup>91</sup>

The confusion really begins when section 109 is read with other 1991 Act provisions on the effective date of particular sections.

1. Conflicting Messages—Section 402(b), often referred to **as** the Wards Cove amendment,<sup>92</sup> further clouds any attempt at statu-

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<sup>88</sup>Contrary to popular understanding, a cause of action under Title VII is not limited to suit in federal courts; state courts also will be forced to consider and rule on these issues. For an excellent summary of the interplay between federal and state civil rights laws in state courts, see Friedman, *supra* note 54; see also Steven H. Steinglass, *The Civil Rights Act of 1991 and The Judicial Improvements Act of 1990: Their Impact on State Court Practice and on the Supplemental Jurisdiction of the Federal Courts*, 742 A.L.J. A.B.A. 93 (1992).

<sup>89</sup>Allen, *supra* note 40, at 589.

<sup>90</sup>Civil Rights Act of 1991, § 402(a).

<sup>91</sup>*Moze v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 932 (7th Cir. 1992).

<sup>92</sup>The sole purpose of this section is to exempt from application of the 1991 Act the case of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). See *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1551 n.7 (9th Cir. 1992); SPECIAL RELEASE,

tory interpretation by specifically not applying the 1991 Act retroactively to one single case. Section 109(c), pertaining to extraterritorial application, also clearly states that "The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."<sup>93</sup> The Ninth Circuit based its retroactive application of the 1991 Act on the negative inference that this specifically prospective provision must mean that the remainder of the 1991 Act is retroactive.<sup>94</sup> This opinion unfortunately fails to recognize the conflicting negative inference based on the veto of the 1990 Act and deletion of the specific retroactivity language from the 1991 Act.<sup>95</sup>

**2. Legislative Intent.**—The Civil Rights Act of 1990 and the original version of the 1991 Act, House Resolution 1, each specifically applied retroactively.<sup>96</sup> In working out a compromise of the 1991 Act, the Senate sponsors of the bill came to an understanding on every issue except retroactivity.<sup>97</sup> Members of Congress littered the congressional record with personal interpretations of the "intent" of the 1991 Act.<sup>98</sup> Senator Dole's opinion, which the Presi-

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*supra* note 17, at viii; *Mozee*, 963 F.2d at 933, n.2, (quoting 137 CONG. REC. S15,478 (daily ed. Oct 30, 1991)(statement of Sen. Dole) ("At the request of the Senators from Alaska, section [402(b)] specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.")).

<sup>93</sup> Civil Rights Act of 1991 § 109(c) (codified at 42 U.S.C. § 2000e-1(c)(1) (1992)).

<sup>94</sup> *Davis*, 976 F.2d at 1551 ("We would rob Sections 109(c) and 402(b) of all purpose were we to hold that the rest of the Act does not apply to pre-Act conduct."). *But see* 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) ("Absolutely no inference is intended or should be drawn from the language of subsection (b) [of section 402 of the Act] that the provisions of the Act of the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended; on the contrary, the intention of subsection (b) is simply to honor a commitment to eliminate every shadow of doubt as to any possibility of retroactive application to the case involving the Wards Cove Company.").

<sup>95</sup> *See generally* Cathcart & Snyderman, *supra* note 25, § XI. ("A difficulty with the reasoning from negative inference is that there is an inferential argument going the other way."); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1376 (8th Cir. 1992) ("The 1990 bill contained specific retroactivity provisions and was vetoed in part for that reason. The 1991 Act omitted those provisions, and the debate in both houses emphasized the need to pass a bill that the President would sign. . . . This sequence of events is highly probative [of prospective application]."). *Accord, Mozee*, 963 F.2d at 933.

<sup>96</sup> *See supra* note 64, (for the specific retroactivity language of the prior bills).

<sup>97</sup> *See* SPECIAL RELEASE, *supra* note 17, n.3.

<sup>98</sup> *See* Cathcart & Snyderman, *supra* note 25, § XI ("The battle over retroactivity was waged on the floor of the House and Senate as Members of Congress sought to create legislative history expressing their views on retroactivity."). *Mozee* found that proponents on both sides of the retroactivity issue "[d]emonstrat[ed] a sophisticated understanding of how judges dissect legislative history." 960 F.2d at 1376. *See also id.* n.10 (an excellent summary of the interpretations placed in the congressional record).

dent endorsed,<sup>99</sup> denounced by memorandum any retroactive application of the Act.<sup>100</sup> In response to the Dole memorandum, Senator Kennedy entered perhaps the most honest assessment of the 1991 Act when he stated, "It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment."<sup>101</sup>

The retroactivity issue in the 1991 Act is perhaps the ideal example of the evils involved in interpreting laws based on legislative intent. By considering the documents involved in the making of legislation, courts have distorted the legislative process, a classic example of the Heisenberg principle applied to the legislative process.<sup>102</sup> "The search for original intent **has** led courts to pursue progressively 'deeper' readings of legislation, usually involving use of the myriad legislative documents such **as** floor debates, conference committee reports, standing committee reports, and even committee hearing **testimony**."<sup>103</sup> Opposing members of Congress were well aware of how courts look to legislative history. Instead of working out a compromise and enacting positive, responsible law, the members instead chose to leave a hole in the 1991 Act with hopes the courts would select their own position on retroactivity.

More than one-half of the Supreme Court's docket is monopolized by review of statutory construction,<sup>104</sup> much of it caused by intentionally poor drafting. Congress leaves these gaps and relies on the courts to read its "intent." Some supporters of legislative interpretation believe the courts should continue to interpret the perceived purpose of laws so that "an already overworked Congress is [not] forced to rewrite statutes whose language does not neatly cover every conceivable situation."<sup>105</sup> This view fails to acknowledge the burden on the courts, the separation of powers contem-

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<sup>99</sup>Statement on signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701,1702 (Nov. 21,1991).

<sup>100</sup>137 CONG. REC. S15,953 (daily ed. Nov. 5, 1991) (statement of Sen. Dole).

<sup>101</sup>137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

<sup>102</sup>By observing the process of lawmaking, the courts have fundamentally altered the process itself. See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17-23 (1989) (examining post-Newtonian theoretical physics as they apply to law).

<sup>103</sup>Symposium, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L. J. 705 (1992) (supporting the use of "positive political theory" for the interpretation of legislation, which involves consideration of the compromise realities in the political process) [hereinafter *Bargains*].

<sup>104</sup>William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 667 (1990) (analyzing data from the 1986 through 1988 terms).

<sup>105</sup>Solimine & Walker, *supra* note 1, at 428 (citing Nicolas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1332 (1990)).

plated in the Constitution, and the virtual impossibility of reading a unified "intent" of a law-making body that consists of over 500 individuals. Any gauging of congressional "intent" also must consider the presidential "trump card" available by veto.<sup>106</sup>

A search for the legislative "intent" behind the retroactivity issue in the 1991 Act is less an analysis of the law than it is a "psychoanalysis of Congress."<sup>107</sup> In such instances, the Supreme Court often has deferred to interpretations by executive agencies.<sup>108</sup> The EEOC, perhaps emulating the example set by Congress, initially decided the 1991 Act applied only to conduct occurring after the effective date of the Act, but then reversed itself.<sup>109</sup> Some courts cited the original EEOC guidance as persuasive.<sup>110</sup> The Ninth Circuit flatly rejected the EEOC's initial position on retroactivity as contrary to the Act's "clear" meaning<sup>111</sup> but likely would endorse the "new" interpretation.

**3. No "Right" Answer.**—The Civil Rights Act of 1991 was a law of compromise. Congressional supporters of the bill sought to draft a law that the President would sign. Instead of compromising on how this law would be implemented, however, "Congressmen manipulated in order to serve their own interests and . . . provided no

<sup>106</sup> See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (discussing the importance of "plain meaning" in statutory interpretation); see also Eskridge, *supra* note 71, at 650–84 (reviewing Justice Scalia's support of the textualist analysis of statutory decisions); Kenneth A. Shepsle, *Congress Is a They, Not an It: Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. (1992).

<sup>107</sup> *United States v. Public Util. Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) ("When we decide from legislative history . . . what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.").

<sup>108</sup> See, e.g., *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1983) (deferring to agency interpretation is appropriate when the statute is unclear, the agency interpretation is reasonable, and neither the law nor the legislative history indicates a clear rejection of the agency's position).

<sup>109</sup> See *Equal Employment Opportunity Commission Policy Guidance on Retroactivity of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 (Dec. 27, 1991), 1991 WL 323429 (finding the Act applies only to conduct occurring after the effective date); see also 59 Daily Lab. Rep. (BNA) AA-1 (Mar. 30, 1993) (reporting that three members of the EEOC voted to reverse the policy on retroactivity without following EEOC procedures on voting; Chairman Kemp, scheduled to leave on April 2, declared the vote out of order and invalid. If implemented, the revised opinion would affect more than 10% of the EEOC's currently pending 60,000 cases).

<sup>110</sup> See, e.g., *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Moze v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992).

<sup>111</sup> *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992).

guidelines on how the Act affects pending cases.”<sup>112</sup> This was not a case of failure to anticipate some improbable contingency, but rather a straight, intentional delegation of lawmaking authority.

The “right” answer to the retroactivity issue will remain in dispute until the issue comes before the Supreme Court. If a majority of the Court shares Justice Scalia’s textualist approach, the 1991 Act certainly will be applied prospectively. Should the Court apply its “manifest injustice” test from *Bonjorno*, it may well adopt the analysis from *Fray*:

Here, the President vetoed a bill containing an explicit retroactivity provision. That veto could not be overridden and a compromise bill omitting those provisions was then enacted. Whatever ambiguities may be found elsewhere in the Act and its legislative history, we think this history is dispositive even under *Bradley*. When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.<sup>113</sup>

Any analysis of the legislative intent would be lacking without considering the President’s veto power.<sup>114</sup> The “intent” of this legislation was to get past the President, and a retroactive law would not have done so.<sup>115</sup>

4. *Right or Wrong, the Supreme Court Will Decide.*—After twice declining to review the retroactivity issue,<sup>116</sup> the Supreme Court agreed to consider the issue. The Court consolidated oral arguments in two cases arising out of the 1991 Act—one a Fifth Circuit sexual harassment case<sup>117</sup> and the other Sixth Circuit suit based on

<sup>112</sup> *Allen*, *supra* note 40, at 577.

<sup>113</sup> *Fray*, 960 F.2d at 1378, (citing NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48.04 (5th ed. 1992)).

<sup>114</sup> *See Bargains*, *supra* note 103, at 718 (“Because the President has a constitutionally granted role in the legislative process, statutory interpretation must take the President’s preferences into account and must accord them considerable weight if the President possessed a credible veto threat over the statute in question.”).

<sup>115</sup> *Id.* at 719 (“A statutory interpretation is invalid if the explicit statement of that interpretation would have caused the President to veto the bill without Congress being able to override the veto.”).

<sup>116</sup> *Moze v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992); *Hamilton v. Komatsu-Dresser, Inc.*, 964 F.2d 600 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 324 (1992).

<sup>117</sup> *Landgraf v. U.S.I. Film Products*, 968 F.2d 427 (4th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993).

race discrimination.<sup>118</sup> With the issue pending before the Court, a reversal of position by the EEOC seems relatively insignificant.<sup>119</sup>

While the retroactivity issue rides its collision course to the Supreme Court, Congress will be left to contemplate the irony of its irresponsible lawmaking. It reversed Court decisions it viewed as repugnant, but intentionally handed back to the Court authority to decide when the new law applies. Unfortunately, retroactivity is only the first ambiguous issue to be litigated; the 1991 Act contains many more examples of such congressional delegation of lawmaking.

### 111. Disparate Impact: The Wards Cove Conondrum

*"The fault . . . is not in our stars, [b]ut in ourselves."*

William Shakespeare<sup>120</sup>

The Supreme Court has defined disparate impact discrimination as "employment policies that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."<sup>121</sup> Although no specific provision of Title VII addressed disparate impact before the 1991 Act, the Court "found" a cause of action in section 703(a)(2) of the Civil Rights Act of 1964, which

makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin.<sup>122</sup>

The Court initially articulated this theory of liability in the landmark case of *Griggs v. Duke Power Co.*<sup>123</sup>

<sup>118</sup>*Rivers v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992)(en banc), *cert. granted*, 113 S. Ct. 1250 (1993).

<sup>119</sup>*See* 29 Daily Lab. Rep. (BNA) AA-1 (Feb. 16, 1993)(reporting that a change to the EEOC's nonretroactivity opinion may be in the offing under the Clinton administration); *see also supra*, note 109, on the "out of order" vote by the EEOC.

<sup>120</sup>WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, 11 (Arthur Humphries ed., Oxford Press 1984).

<sup>121</sup>*International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

<sup>122</sup>42 U.S.C. § 2000e-2(a)(2) (1988).

<sup>123</sup>401 U.S. 424 (1971).

### A. Development of Disparate Impact Discrimination

The Supreme Court developed a three-part analysis for disparate impact in *Griggs* and subsequent cases.<sup>124</sup> First, the plaintiff had the burden of establishing a prima facie case by showing that a facially neutral employment practice disproportionately affected a recognized minority. If the plaintiff established the prima facie case, the employer had to prove that the challenged practice was justified by "business necessity." Finally, the plaintiff could rebut the employer's evidence of business necessity by showing that other practices could have served the employer's legitimate business interests with less impact on the affected minority.<sup>125</sup>

The Court refined the concept of "business necessity" in later cases. Originally, it focused on whether the challenged practice was "job related"—a more narrow view of business necessity.<sup>126</sup> Later cases analyzed business necessity from the broader scope of the employer's "legitimate employment goals."<sup>127</sup>

These later Supreme Court cases consistently imposed on the employer the burden of proof on the issue of business necessity. In 1988, however, a plurality of the Court held in *Watson v. Fort Worth Bank & Trust Co.*<sup>128</sup> that the plaintiff maintained the burden of proof in a disparate impact case. Justice O'Connor wrote for the plurality, which found that an employer must only articulate legitimate business reasons for its practice. The plaintiff must prove that the stated policy was not legitimate or the employer's goals could be met by less onerous practices and the plaintiff also is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."<sup>129</sup>

Before *Watson*, the Supreme Court had inexplicably applied different tests for disparate impact discrimination and disparate treatment—or intentional—discrimination. The plurality's holding in *Watson* actually brought disparate impact analysis in line with the well-established test for disparate treatment cases from *McDonnell-Douglas Corp. v. Green*.<sup>130</sup> Under this three-part test, a plaintiff

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<sup>124</sup>The leading cases in disparate impact discrimination before *Wards Cove* were *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *New York City Transit v. Beazer*, 440 U.S. 568 (1979); *Connecticut v. Teal*, 457 U.S. 440 (1982).

<sup>125</sup>See SPECIAL RELEASE, *supra* note 17, § 4.

<sup>126</sup>*Griggs* applied a strict test of "manifest relationship to the employment practice in question." 401 U.S. at 432.

<sup>127</sup>*New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979).

<sup>128</sup>487 U.S. 977 (1988).

<sup>129</sup>*Id.* at 993.

<sup>130</sup>411 U.S. 792 (1973).

must identify specific discriminatory acts and establish a *prima facie* case of discrimination; the employer then has a burden of *production* to show a valid, nondiscriminatory reason for its actions; to establish liability, the plaintiff then must demonstrate that the employer's articulated reasons are a mere pretext for discrimination.<sup>131</sup> At all times the burden of *persuasion* remains on the plaintiff.

**B. *Wards Cove Packing* v. Atonio**

*Watson* set the stage for *Wards Cove*.<sup>132</sup> In *Wards Cove* the plaintiffs were nonwhite cannery workers who filed suit in 1974 alleging that the company discriminated against them when hiring and promoting into noncannery positions (mostly administrative and management jobs).<sup>133</sup> After a lengthy and complex gauntlet of appeals and remands,<sup>134</sup> the case came before the Supreme Court in 1989. The Court reversed an en *banc* finding of discrimination and remanded the case to the Ninth Circuit to reanalyze what the Court perceived as a misapplication of statistical information.<sup>135</sup> The circuit court had found a *prima facie* case of discrimination in the simple disparity between minorities in the geographical labor market and those hired into the cannery and noncannery positions. The Supreme Court held that the proper analysis required a comparison of the *qualified* labor pool for the cannery and noncannery positions and those hired into the disputed positions.<sup>136</sup> The record did not reflect whether the qualified nonwhite applicants were disproportionately passed over for selection and promotion when compared to the qualified white applicants in the labor pool.

After its holding based on misapplication of statistical evidence, the Court gratuitously outlined additional evidentiary considerations for disparate impact cases. These changes to prior law can be divided into four areas:

- Redefining "business necessity" to allow evidence

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<sup>131</sup> *Id.* at 802. The *prima facie* case is established by showing that the plaintiff is a member of a protected group (by race, color, sex, religion, or national origin) and the employer's most likely legitimate basis for taking the challenged action is unfounded. See generally SCHLEI & GROSSMAN, *supra* note 4, § 2.5.

<sup>132</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

<sup>133</sup> 490 U.S. at 645.

<sup>134</sup> See *id.* at 647-49 (description of the case history).

<sup>135</sup> *Id.* at 650-55.

<sup>136</sup> *Id.* at 650-51. The courts had widely applied the concept of "qualified" labor pool before *Wards Cove*. See, e.g., *McCullough v. Consolidated Rail Corp.*, 776 E Supp. 1289 (N.D. Ill. 1991) (finding that qualified, as used in the context of a *prima facie* case of disparate impact discrimination, does not necessarily mean best qualified for the position; it does require a showing of being competent and otherwise eligible).

of “legitimate employment goals” instead of a strict job-related business necessity standard. The Court stated that a “mere insubstantial justification” would be insufficient, but “there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster.”<sup>137</sup>

- “Clarifying” that an employer has a burden of production instead of persuasion in establishing a valid “business necessity.”<sup>138</sup> The Court emphasized that the burden of persuasion always remains with the plaintiff in an employment discrimination action.

- Specifically adopting language from *Watson* requiring a plaintiff to specify particular employment practices that caused the challenged practice to have a disparate impact.<sup>139</sup>

- Emphasizing that a plaintiff’s alternative business practices must be “equally effective as [the employer’s] chosen hiring procedures in achieving [the employer’s] legitimate employment goals.”<sup>140</sup> In determining what is equally effective, “factors such as the cost or other burdens of proposed alternative selection devices are relevant.”<sup>141</sup>

### C. The *Civil Rights Act* of 1991

Two of the four stated purposes of the 1991 Act address disparate impact suits.<sup>142</sup> Section 3143 of the 1991 Act specifies that it is

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<sup>137</sup> 490 U.S. at 659. The Court also referenced here “a host of evils” it previously had identified, referring to the possibility of employers establishing employment quotas to protect themselves against disparate impact claims. This reasoning would later become the guidon for the Bush Administration in its objections to the Civil Rights Act of 1990 and to the initial drafts of the 1991 Act, discussed *infra* at notes 179–181 and accompanying text.

<sup>138</sup> 490 U.S. at 659. The Court stated that “[w]e acknowledge that some of our earlier decisions can be read as suggesting otherwise. . . . But to the extent that those cases speak of an employer’s ‘burden of proof’ with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer’s production—but not persuasion—burden.” *Id.* at 660.

<sup>139</sup> *Id.* at 656 (“the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities”) (quoting *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 994 (1988)).

<sup>140</sup> 490 U.S. at 661.

<sup>141</sup> *Id.*

<sup>142</sup> The Supreme Court established this concept of discrimination in *Griggs*, which some commentators have heralded as “the most important court decision in employment discrimination law.” *See, e.g., SCHLEI & GROSSMAN, supra* note 4, at 5.

<sup>143</sup> Civil Rights Act of 1991 § 3(2). *See supra* note 57 for the text of Section 3(2).

intended to legislatively overrule the Supreme Court's decision in *Wards Cove*<sup>144</sup> and reestablish the rule of law from *Griggs*.<sup>145</sup> Although the 1991 Act reverses portions of *Wards Cove*, it leaves intact much of the case and falls far short of providing clear guidance to the courts on how to reconcile the gaps.

The 1991 Act is intended to overturn *Wards Cove* and codify the *Griggs* scheme on burden of proof in disparate impact cases.<sup>146</sup> Ironically, Congress adopted substantial language from *Wards Cove* and left intact some of the dicta "directions" most damaging to plaintiffs in disparate impact cases. Congress also bowed to intense lobbying and carved out a specific exception in the 1991 Act for the *Wards Cove* case; this section of the Act is specifically prospective from the date *after* the *Wards Cove* holding.<sup>147</sup> Coupled with Congress's inability to reach a compromise definition of the terms "business necessity" and "job related,"<sup>148</sup> this fork-tongued amendment typifies the schizophrenic composition of the 1991 Act. The amendment also adds more fuel to the already flaming fire of legal battles over the issue of retroactive application of the remainder of the 1991 Act.<sup>149</sup>

*1. Business Necessity.*—Congress not only returned the "necessity" to the business necessity of disparate impact analysis in the 1991 Act, it also imposed an even greater burden on employers to demonstrate "job relatedness" than previously applied by the

<sup>144</sup> *Wards Cove*, 490 U.S. 642 (1989).

<sup>145</sup> The 1991 Act also specifically preserves all "other Supreme Court decisions prior to *Wards Cove*." See *supra* note 57 for the text of the 1991 Act.

<sup>146</sup> One commentator describes this portion of the 1991 Act as where "Congress and the President told a conservative Supreme Court that enough is enough." See J. Shannon, *The Civil Rights Act of 1991: What Does it Mean to Me?*, 26 A.P.R. ARK. LAW. 16, 18 (1992).

<sup>147</sup> Civil Rights Act of 1991 § 402(b). This section states the following: "Certain Disparate Impact Cases. Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1989." Numerous groups protested this overt political duplicity and lobbied intensely against it. See, e.g., *supra* notes 76-77 (citations). Congressman McDermott also has proposed legislation to overturn Section 402(b) entitled the "Justice for *Wards Cove* Workers Act." H.R. 1172, 103d Cong., 1st Sess. (1993)

<sup>148</sup> "The demonstration referred to by subparagraph (a)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" Civil Rights Act of 1991, § 105(a) (codified at 42 U.S.C. § 2000e-2(k)(1)(C) (1992)). This provision simply refers to pre-*Wards Cove* law. Subparagraph (b) also limits interpretation of "business necessity/cumulation/alternative business practice" to an interpretive memorandum entered into the Congressional Record. Id. § 105(b). See *infra*, text accompanying note 155 for the relevant portion of the Interpretive Memorandum.

<sup>149</sup> See *supra* notes 74-78 and accompanying text (discussion of retroactivity issue and effect of the *Wards Cove* exception on the interpretation of retroactivity).

courts. Section 105(a) of the 1991 Act states that an unlawful employment practice based on disparate impact is established if

a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.<sup>150</sup>

The job relatedness and business necessity tests required by this section do not distinguish between practices related to selection of employees and those not related to selection, as did prior versions of the bill.<sup>151</sup> Congress could not agree, however, on a definition of the terms “job related” and “business necessity.” The compromise merged the two sections and left the terms undefined and open to interpretation by the courts during litigation.<sup>152</sup>

Congress openly authorizes the courts to define the terms by specifically limiting the use of legislative history.<sup>153</sup>

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 (daily

<sup>150</sup>Civil Rights Act of 1991, § 105(a) (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1992)); see also Michael J. Davidson, *The Civil Rights Act of 1991*, ARMY LAW., Mar. 1992, at 6 (citing remarks from the unofficial legislative history).

<sup>151</sup>The last House version of the 1991 Act defined “business necessity” for two different scenarios—employment decisions involving selection and those not involving selection. It provides as follows:

(o)(1) The term ‘required by business necessity’ means—(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or (B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer. (2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

H.R. 1, 102d Cong., 1st Sess. § 3(o) (1991).

<sup>152</sup>See Ingerswon, *New Civil Rights Law Bears Seeds of Controversy*, THE CHRISTIAN SCI. MONITOR, Nov. 21, 1991, at 2, col. 2 (“[I]n passage, the bill had to blur a key point by avoiding a clear definition of how business can justify job requirements that end up discriminating by race or sex.”).

<sup>153</sup>This doubtlessly was motivated by volumes of “legislative history” placed into the record by both pro-employee and pro-employer proponents. See *supra* notes 97–101 and accompanying text (discussing Congress’s limiting the use of legislative history in greater detail).

ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.<sup>154</sup>

The referenced Interpretive Memorandum sheds little light on the elusive “jobrelated/business necessity” mystery. The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).<sup>155</sup>

This “official” history incorporates all Supreme Court cases before Wards Cove. Congress appears dissatisfied with the Court’s holding but trusted the Court to define the essential terms in the 1991 Act and reach a different conclusion based on its own precedents.<sup>156</sup>

**2. Reality Check.**—The Supreme Court actually had applied several different tests for business necessity before its holding in Wards Cove. *Griggs* used the terms “business necessity” and “job related” interchangeably.<sup>157</sup> Later cases, especially *New York City Transit Authority v. Beazer*<sup>158</sup> and *Connecticut v. Teal*,<sup>159</sup> emphasized that the challenged practice be job related in much broader terms of employment goals. Despite the subtle twists of analysis in Wards Cove, the lower courts were on much firmer ground in under-

<sup>154</sup> Civil Rights Act of 1991, § 105(b).

<sup>155</sup> 137 CONG. REC. S15,276 (daily ed. Oct 25, 1991).

<sup>156</sup> Many courts undoubtedly will attempt to gauge “the intent of Congress” before attempting to define these terms. This would not only be a futile search, it also would help to encourage such careless draftsmanship in future legislation. See generally Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992) (“The problems that have resulted from judicial reliance on legislative history would probably prompt Learned Hand today to reject the legislative histories he once embraced.”) [hereinafter *Learned Hand*].

<sup>157</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); see also *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (overturning the use of height and weight standards for the selection of correctional counselors based on job relation—a strict interpretation of business necessity).

<sup>158</sup> 440 U.S. 568, 587 n.31 (1979) (holding that the challenged practice must serve “legitimate employment goals of safety and efficiency.”).

<sup>159</sup> 457 U.S. 440, 451 (1982) (“The examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance of [the job].”). Circuit courts of appeals also had begun to apply a job related standard based on legitimate employment goals. See, e.g., *Rivera v. City of Wichita Falls*, 665 F.2d 534, 537 (5th Cir. 1982); *Gillespie v. Wisconsin*, 771 F.2d 1035, 1040 (7th Cir. 1985), cert. denied, 477 U.S. 1083 (1986); see generally SCHLEI & GROSSMAN, *supra* note 4, at 102–14; FIVE YEAR SUPPLEMENT TO EMPLOYMENT DISCRIMINATION LAW 43 (BNA Books, 1989) [hereinafter FIVE YEAR SUPPLEMENT].

standing and applying the concepts of business necessity and job related before Congress muddled the waters.<sup>160</sup>

The business necessity requirement involved in initial selection practices may differ significantly by position recruited and from those used for other personnel decisions or internal promotions.<sup>161</sup> The 1991 Act makes no distinction for these different scenarios. The 1991 Act's language—"job related for the position in question"—appears to reject the use of nonjob related criteria such as attendance, training, personal hygiene, and manners.<sup>162</sup> This definition not only conflicts with EEOC guidance and prior case law,<sup>163</sup> it also creates yet another issue for the courts to resolve.

Total confusion aptly describes the current state of disparate impact law. Lower courts are left to sort out the scramble of issues Congress created. The 1991 Act does not specifically overrule *Wards Cove* or define business necessity inconsistently with the Court's holding.<sup>164</sup> It also fails to address the application of *Watson*, a case "prior to" *Wards Cove* that contains much the same analysis. The 1991 Act's lack of clear direction and definitions opens the door for advocacy by both sides in a disparate impact suit.

Employee plaintiffs and defendant employers both will have excellent arguments to support their own interpretations of how "essential" to job performance a test must be to satisfy business necessity and what constitutes job related. Portions of the unofficial legislative history indicate that business necessity and job relatedness no longer can be interpreted as including broad business goals that are unrelated to specific job performance.<sup>165</sup> This view was not

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<sup>160</sup> See SPECIAL RELEASE, *supra* note 17, § 4 ("These lower court decisions have lost their authority both as to what the terms mean and whether both are necessary elements to the employer's defense.").

<sup>161</sup> The EEOC's *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.5(I) (1991), recognize such distinctions: "If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at a higher level."

<sup>162</sup> See generally SCHLEI & GROSSMAN, *supra* note 4, ch. V. (discussing use of subjective criteria in hiring).

<sup>163</sup> See *infra* notes 327-28 and accompanying text.

<sup>164</sup> Cathcart & Snyderman, *supra* note 25, § III.B.3.

<sup>165</sup> "Justifications such as customer preference, morale, corporate image, and convenience, while perhaps constituting 'legitimate' goals of an employer, fall far short of the specific proof required under *Griggs* and this legislation to show that a challenged employment practice is closely tied to the requirements of performing the job in question and thus is 'job related for the position in question.'" 137 CONG. REC. H9528 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). Representative Edwards reasoned that the language "job related for the position in question and consistent with business necessity" was borrowed from § 102(b)(6) of the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213

adopted in the law itself, and a negative inference argument exists to counter this analysis.<sup>166</sup>

Employers certainly will want to argue *Wards Cove's* language: "the dispositive issue . . . [is] whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."<sup>167</sup> This is but a restatement of language from *Beazer's* "legitimate employment goals of safety and efficiency."<sup>168</sup> Since earlier Supreme Court cases are specifically preserved in the 1991 Act,<sup>169</sup> courts should continue to define job related as including "legitimate employment goals," a position also well supported in the "unofficial" legislative history.<sup>170</sup>

Congress has, in the words of one commentator, "imposed on employers, the bar, and the courts the burden of determining both the degree of necessity and the extent of job relatedness required for a showing of business necessity in disparate impact analysis."<sup>171</sup> This area, quite certainly, "remains a fertile ground for advocacy."<sup>172</sup>

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(1992)), and "this language clearly requires proof by an employer of a close connection between a challenged practice with disparate impact and the ability to actually perform the job in question." *Id.*

<sup>166</sup> *But see supra* notes 94-95 and accompanying text (discussion of how a negative inference cuts both ways when applied to the 1991 Act).

<sup>167</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (citing *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 997-99; *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

<sup>168</sup> *Beazer*, 440 U.S. at 587 n.31.

<sup>169</sup> Section 3(2) of the 1991 Act states that one of the purposes of the Act is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*." Civil Rights Act of 1991, § 3(2) (citations omitted). Since *Wards Cove* was simply a restatement and clarification of existing case law, its analysis, if not its precedential value, continues to be valid.

<sup>170</sup> Senator Dole's interpretation is that

"job related for the position in question" is to be read broadly, to include any legitimate business purpose, even those that may not be strictly required for the actual day-to-day activities of an entry level job. Rather, this is a flexible concept that encompasses more than actual performance of actual work activities or behavior important to the job.

137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991) (statement of Sen. Dole). President Bush formally endorsed this interpretation in the signing ceremony for the 1991 Act. Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991).

<sup>171</sup> *Cathcart & Snyderman, supra* note 25, § III.B.

<sup>172</sup> *Davidson, supra* note 150, at 7. *See also* Irving Geslewitz, *Understanding the 1991 Civil Rights Act*, 38 PRAC. LAW No. 2, 57 (1991) ("No doubt this issue will fuel protracted controversy, with further clarification likely coming from the courts rather than Congress."). Another "fertile" issue is the "drug exception" in section 105, which states that

Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or pos-

3. *Burden of Proof*.—The clearest articulation of law in the 1991 Act imposes on the employer the burden of persuasion for business necessity and job relatedness—however those terms will be defined. It imposes liability on an employer who “fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>173</sup> The 1991 Act defines “demonstrates” as meeting *both* the burden of production and persuasion.<sup>174</sup> The plaintiff must therefore demonstrate only that the challenged practice has a disparate impact to shift the burden of production and persuasion onto the employer to show job relatedness and business necessity.<sup>175</sup>

The Bush Administration willingly conceded the “restoration” of the *Griggs* test of shifting burdens of proof in disparate impact suits.<sup>176</sup> This was probably the least controversial of the disparate impact changes.<sup>177</sup> Only extensive litigation will reveal whether this burden to “demonstrate” will cause employers to institute “quota” hiring systems,<sup>178</sup> the concern voiced by the Court in *Wards Cove*. During this litigation, however, a common issue will be whether the plaintiff had adequately identified an “employment practice”—the new “key” to disparate impact liability.

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sesses a controlled substance, . . . other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

Civil Rights Act of 1991, § 105(c) (codified at 42 U.S.C. § 2000e-2(k)(3) (1992)). Little imagination is needed to contemplate arguments for either plaintiffs or employers using this language.

<sup>173</sup>Civil Rights Act of 1991, § 105 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1992)).

<sup>174</sup>*Id.* § 104 (codified at 42 U.S.C. § 2000e(m) (1992)).

<sup>175</sup>The plaintiff’s burden requires demonstrating the discriminatory impact of *particular* practices. *See infra* notes 179–83 and accompanying text for the plaintiff’s burden of demonstrating “particularity.”

<sup>176</sup>In his memorandum to President Bush, which was attached to the President’s veto of the 1990 Act, then Attorney General Richard Thornburgh wrote: “As you know, your administration is prepared to accept the shifting of this burden [of proof] to the defendant.” 136 CONG. REC. S16,562 (daily ed. Oct 24, 1990).

<sup>177</sup>Cathcart & Snyderman, *supra* note 25, § III.B.

<sup>178</sup>One commentator believes as follows:

[I]t will depend on the results that emerge in future disparate impact cases. If the perception among employers is that their success rate in these cases is too low, many of them may apply a cost-benefit analysis and conclude that they are safer in hiring and promoting by numbers reflecting the percentages in the surrounding community than by risking disparate impact lawsuits they are likely to lose. On the other hand, if employers perceive that they can win these cases, they may not let this consideration sway hiring decisions.

Geslewitz, *supra* note 172, at 62.

4. *Particularity—The Quota Dispute.*—Congress resolved few issues and created many when it attempted to delineate a plaintiffs' burden when challenging an "employment practice." The 1991 Act incorporates language from *Wards Cove*<sup>179</sup> that dates back to at least 1982.<sup>180</sup>

With respect to demonstrating that a particular employment practice causes a disparate impact . . . , the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making practice are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.<sup>181</sup>

This "particularity" requirement was part of the compromise to save the 1991 Act from another veto as a "quota bill."<sup>182</sup> The first obvious issue it creates for the courts is the definition of "employment practice," another term Congress failed to define. An additional issue is how the plaintiff demonstrates that a practice is "not capable of separation for analysis." The most ambiguous aspect of the analysis, however, is a new "no cause" defense.<sup>183</sup>

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<sup>179</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) ("A plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

<sup>180</sup> See *Pouncey v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982).

<sup>181</sup> Civil Rights Act of 1991, § 105 (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (1992)). The original draft of the 1991 Act allowed a plaintiff simply to establish a disparate impact without demonstrating which particular practice caused the impact. See H.R. 1, 101st Cong., 2d Sess., § 4 (1991) ("If a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact."). President Bush called this a "quota" provision when he vetoed the 1990 Act. 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

<sup>182</sup> President Bush continued to ride the "quota" horse after his veto of the 1990 Act. See, e.g., Martin Schram, *Bush is Jogging on the Racial Low Road*, NEWSDAY, June 6, 1991, at A1 ("It's a quota bill, no matter how the authors dress it up. You can't put a sign on a pig and say it's a horse."). The President finally accepted the compromise language authored by Senator Danforth, stating "we have reached an agreement with Senate Republican and Democratic leaders on a civil rights bill that will be a source of pride for all Americans. It does not resort to quotas, and it strengthens the cause of equality in the workplace." *Bush News Conference on Civil Rights Accord*, N.Y. TIMES, Oct. 26, 1991, § 1 at 7. The President's political motivation in supporting the bill was obvious to most. See, e.g., Robin Toner, *Having Ridden Racial Issues, Parties Try to Harness Them*, N.Y. TIMES, Oct. 27, 1991 § 1 at 1 ("Mr. Bush . . . pulled off yet another deft move in racial politics. He presented himself Friday as both the opponent of quotas and the defender of civil rights, a comfortable place to be in American politics.").

<sup>183</sup> Civil Rights Act of 1991, § 105(a)(B)(ii) (codified at 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (1992)) ("If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to

(a) Employment Practices and “*Alternatives*.”—The definition of “alternative employment practice” begets the question of “What is an employment practice?” The 1991 Act defines neither. Courts will have ample sources of reference and opportunities to find or to create definitions for these terms.

The exclusive legislative history of the 1991 Act uses the height and weight standards of *Dothard v. Rawlinson*<sup>184</sup> as an example of one employment practice.<sup>185</sup> Because height and weight standards are “functionally integrated components” of the criterion “strength,” these requirements are considered one employment practice.<sup>186</sup>

Having reached some understanding of an employment practice under the 1991 Act, courts still will wrestle with the concept of an “alternative employment practice.” This new term replaces the “pretext” element from the pre-*Wards Cove* analysis. The 1991 Act is internally confusing by stating that the concept is to be defined “in accordance with the law as it existed [before *Wards Cove*],”<sup>187</sup> but using the language “alternative employment practice” directly from that case. Congress’s “explanation” of how a plaintiff demonstrates liability is therefore somewhat circular. “The complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.”<sup>188</sup> This section raises additional issues certain to be heard in courts throughout the land.

Employers will argue that this section is the equivalent of the previous pretext element. After the employer demonstrates job relatedness and business necessity, the plaintiff (employee) can pre-

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demonstrate that such practice is required by business necessity.”). See *infra* text accompanying notes 203–09 (discussion of no cause defense); see also SPECIAL RELEASE, *supra* note 17, § 4 (“A major issue is whether this new defense differs from the previous rebuttal possibility of the employer to undermine plaintiff’s showing of impact.”).

<sup>184</sup>433 U.S. 321 (1977). See *infra* text accompanying note 201 (text of the Interpretive Memorandum).

<sup>185</sup>137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991) (Interpretive Memorandum).

<sup>186</sup>SPECIAL RELEASE, *supra* note 17, § 4. Lower courts had come to some understanding of what constituted a “practice” in disparate impact cases. See, e.g., Council 31, AFL-CIO v. Ward, 771 F. Supp. 247 (N.D. Ill. 1991) (holding that to constitute a practice sufficient to establish a disparate impact claim, the allegedly discriminatory conduct must be a continuing, ongoing system or method used by the employer in the course of regularly conducted employment activity). The precedential value must be questioned after the changes in the 1991 Act.

<sup>187</sup>Civil Rights Act of 1991, § 105(a) (codified at 42 U.S.C. § 2000e-2(k)(1)(C) (1992)).

<sup>188</sup>*Id.* § 105(a) (codified at 42 U.S.C. § 2000e-2(k)(1)(a)(ii) (1992)). See *supra* text accompanying note 187 (explanation of the contents of subparagraph (C)).

vail only by proving the existence of an alternative practice with a lesser impact that the employer refused to adopt.<sup>189</sup> This approach may agree with prior law but is inconsistent with a literal—or textualist—reading of the law.<sup>190</sup>

The two new subsections to section 703(k)(1)(A) of the 1991 Act<sup>191</sup> are joined by the disjunctive “or.” This appears to create three steps in a disparate impact analysis with two separate routes for the employee to establish liability: (1) the employee demonstrates the challenged practice had a disparate impact; (2) the employer fails to demonstrate job relatedness or business necessity; *or* (3) despite the employers showing of job relatedness and business necessity, the employee demonstrates a less drastic alternative practice the employer refused to adopt.<sup>192</sup>

The only thorough analysis of alternative employment practice appears in *Wards Cove*.<sup>193</sup> The Court stated, for example, that a plaintiff’s proposed alternative employment practice “must be equally effective as [the employer’s] . . . in achieving . . . [the employer’s] legitimate employment goals.”<sup>194</sup> The Court also emphasized that courts “should proceed with care” before requiring an employer to adopt an alternative employment practice and must consider “cost or other burdens” in making their determination.<sup>195</sup>

Once again, the lower courts will be tasked with unraveling the tangled interplay between the 1991 Act and *Wards Cove*. *Wards Cove* cites *Watson and Albemarle Paper Co.* as authority for its alternative practice analysis. Those decisions continue to be binding pre-

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<sup>189</sup> The plaintiff has the burden of proof with respect to the alternative practice and would be required to demonstrate that the alternative practice had a lesser impact than the one chosen by the employer, the employer was aware of the alternate practice, and the employer refused to adopt the alternate practice. Congress could have defined all these terms but, instead, left them open to development in the courts. This result of a frenzied compromise, motivated by reelection politics, certainly would earn a failing grade in a college level course on legislative drafting.

<sup>190</sup> The “textualist” analysis limits interpretation to the actual language of the law. For an excellent summary of the differences between the textualist approach and statutory interpretation, see Learned Hand, *supra* note 156; see also Solimine & Walker, *supra* note 1 (critically reviewing the textualist approach).

<sup>191</sup> 42 U.S.C. 2000e-2 (1991). *Cf.* text accompanying notes 45 & 48.

<sup>192</sup> See SPECIAL RELEASE, *supra* note 17, § 4 n.80 and accompanying text (Resolution of these issues should provide full employment opportunities for labor attorneys for many years).

<sup>193</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660–61.

<sup>194</sup> *Id.* at 661.

<sup>195</sup> *Id.* Several circuit court cases also have upheld the relevance of cost in consideration of alternative business practices. See, e.g., *Clady v. County of Los Angeles*, 770 F.2d 1424, 1426 n.1 (9th Cir. 1985), *cert. denied*, 475 U.S. 1009 (1986); *Christner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981). *But see* *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978).

cedent; indeed, they are specifically preserved in the 1991 Act itself.<sup>196</sup> Should the lower courts continue to apply these cases, the concept of alternative employment practices from *Wards Cove*—the actual basis of the Court's holding—will survive the 1991 Act.

(b) Practices *Not* Capable of Separation.—The 1991 Act creates a fall-back position for plaintiffs who are unable to demonstrate the disparate impact of particular employment practices; they can demonstrate particular practices are “not capable of separation for analysis.”<sup>197</sup> This is another wholecloth creation of Congress for which courts will be called on to hem the borders in the course of vigorous litigation.

Astute defense attorneys certainly will attempt to force the particularity issue by pretrial motion for failure to specify sufficiently particular employment practices. Plaintiffs will argue that the employment practices are sufficiently particular, or, in the alternative, are incapable of separation. The courts initially will decide the particularity motion only to face it again in a motion for summary judgment after discovery is complete.<sup>198</sup> The plaintiff who succeeds in having the employer's decisionmaking process analyzed as one employment practice—the “bottom line” of the employment numbers—still may be defeated by the employer's final line of defense; a showing of no cause.<sup>199</sup>

The 1991 Act and its “official” history contain conflicting interpretations of this exception to the particularity requirement. The statutory language speaks of practices “not capable of separation for analysis.”<sup>200</sup> The official legislative history addresses “functionally integrated practices”: “When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, the particular, functionally-integrated practices may be analyzed as one employment practice.”<sup>201</sup>

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<sup>196</sup> See *supra* note 169 and accompanying text.

<sup>197</sup> See *supra* note 181 and accompanying text for the actual language of the 1991 Act. Entries in the “unofficial” legislative history of the Act indicate that mere difficulty or expense in demonstrating particular practices is insufficient. See, e.g., 137 CONG. REC. S15,474 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond).

<sup>198</sup> Cathcart & Snyderman, *supra* note 25, § III.B.2.

<sup>199</sup> See *infra* notes 203–08 and accompanying text (discussion of the no cause defense).

<sup>200</sup> See *supra* text accompanying note 181 for the actual statutory language.

<sup>201</sup> 137 CONG. REC. S15,276 (daily ed. Oct. 30, 1991) (Interpretive Memorandum); see *supra* note 184 and accompanying text.

The "functionally integrated practice" test appears to be much narrower than "not capable of separation," but its application may be limited. "Functionally integrated" may apply only to separate components of one employment practice, such as an intelligence or similar test.<sup>202</sup> Plaintiffs certainly will attempt to argue for a much broader definition; for example, plaintiffs will attempt to convince the court that multiple practices are "functionally integrated" as an alternative to demonstrating that the challenged practices are incapable of separation. This analysis requires the employer to defend all aspects of the hiring or employment process. How the courts will rule is a coin toss, and Congress provided no odds on the outcome.

(c) *No Cause Defense to Bottom Line Impact*.—The "no cause" defense is also new to Title VII and ripe with unanswered questions. The 1991 Act states, "if the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity."<sup>203</sup> This provision is another cure for the Bush Administration's "quota bill" objection.<sup>204</sup>

Congress, unfortunately, again failed to outline or shed any insight on how to apply this provision. This provision apparently allows the employer to avoid proving job relatedness and business necessity by first demonstrating that a specific challenged employment practice does not cause a disparate impact.<sup>205</sup> The hanging "but" here is what effect this has on the plaintiff who has demonstrated an overall disparate impact in the employer's selection process (referred to as "bottom line" impact). The only logical answer is that the plaintiff loses.<sup>206</sup> An employer who demonstrates that a challenged practice has no disparate impact must prevail. Any other outcome would impose on employers absolute liability to explain and account for foreseeable and unforeseeable outcomes of every aspect

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<sup>202</sup>This was the outcome envisioned by Republican supporters of the 1991 Act. "For instance, a 100 question intelligence test may be challenged and defended as a whole; it is not necessary for the plaintiff to show which particular questions have a disparate impact." 137 CONG. REC. S15,474 (daily ed. Oct 30, 1991) (statement of Sen. Dole).

<sup>203</sup>Civil Rights Act of 1991, § 105 (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (1992)).

<sup>204</sup>See Cathcart & Snyderman, *supra* note 25, § III.B.3.

<sup>205</sup>SPECIAL RELEASE, *supra* note 17, § 4.

<sup>206</sup>See *id.* § 4 n.84 ("There exists the possibility that defendant could carry its burden on all the employment practices making up its selection process without undermining the bottom line showing of impact. Presumably defendant would win because the unexplained was not attributable to the employer.").

of the employment process,<sup>207</sup> Liability for disparate impact discrimination would become based not only on unintentional actions but on unforeseeable actions beyond the employer's control as well.<sup>208</sup>

Another unanswered question is whether this no cause defense applies only to multicomponent cases. Logic and the construction of section 105 indicate that it would apply even to a single challenged employment practice.<sup>209</sup> An employer who is able to demonstrate that a challenged selection practice has no discriminatory impact should not be required to demonstrate job relatedness or business necessity.

#### D. What About *Those* Statistics?

One of the more troubling oversights in the 1991 Act is the absence of any response to the actual holding in *Wards Cove* regarding a plaintiff's use of statistical data. The Court believed that a "dearth" of qualified minority applicants in the geographic area cannot be used to demonstrate that an employer's employment practices have a disparate impact.<sup>210</sup>

The Court's holding in *Wards Cove* was based in part on its perception of the "goals behind the statute."<sup>211</sup> In the 1991 Act, Congress denounced the use of hiring quotas, which the *Wards Cove* Court feared would be the result of allowing use of statistical comparisons based on the minority members in the geographic area. Although the "qualified labor pool" can be representative of the minority population in the geographic area, it would be more coincidence than correlation. The key test that survives *Wards Cove* is whether "the percentage of selected applicants who are [a minority] is not significantly less than the percentage of qualified applicants

<sup>207</sup> See Cathcart & Snyderman, *supra* note 25, § III.B.3 ("Many employers were concerned that this 'bottomline' attack would impose on them the nearly impossible requirement of defending all of their employment practices, or would require them to commence a tactically self-destructive litigation effort to show that alleged employment discrimination had been caused by one practice and not all of them.").

<sup>208</sup> This outcome is consistent with the EEOC's *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4(C) (1991), which requires evidence that the "total" selection process results in an adverse impact.

<sup>209</sup> An employer who successfully can show that a single challenged practice does not have a disparate impact should, logically, avoid any liability. The particularity and no cause provisions amend § 703(k)(1)(B) of the Civil Rights Act of 1964. The two new subsections, (i), addressing multicomponent practices and (ii), the no cause provision, are not connected, however, by either a coordinating or subordinating conjunction. This indicates that the two sections are separate components and the no cause defense would apply to a single challenged employment practice. See SPECIAL RELEASE, *supra* note 17, § 4.

<sup>210</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 (1989).

<sup>211</sup> *Id.* at 652.

who are [a minority].'<sup>212</sup> The dissent in *Wards Cove* characterized this analysis as a "major stride backwards in the battle against race discrimination,"<sup>213</sup> but the 1991 Act failed to counterattack.

The Court's restrictive recognition of statistics in *Wards Cove* appears to remain good law.<sup>214</sup> The Act codifies the Court's distinction between particular practices and "bottom line" impact. Creative plaintiffs' counsel surely will argue that the 1991 Act overrules the Court's prior analysis and guidance on the use of statistics. Plaintiffs still are required to show causation, however, and this burden includes eliminating external factors that could explain a statistical disparity.<sup>215</sup>

The changes in disparate impact law in the 1991 Act promise to generate far more in litigation costs, confusion, and aggravation than they will provide in relief to potential plaintiffs for many years. All the issues raised above eventually will be resolved, at great expense and trouble. If the issues proceed through the lower courts as quickly as they did in *Wards Cove*, the Court will entertain argument sometime in the year 2006.

### *E. Race Norming—The Dos and Don'ts of Test Scores*

Employers have used scored, objective tests as employee selection tools for many years, increasingly so in the twentieth century.<sup>216</sup> The 1964 Act specifically acknowledged this practice by allowing employers to "act upon the results of any professionally developed ability test."<sup>217</sup> The 1991 Act amendments do not prohibit

<sup>212</sup>*Id.* at 653. The Court recognized that this is a "bottom line" analysis and that an employee still could establish that a particular employment practice has a disparate impact even when the bottom line shows a balanced minority representation. *Id.* n.8.

<sup>213</sup>*Id.* at 661–62 (Blackmun, J., joined by Brennan and Marshall, J.J., dissenting) ("[I]t requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.").

<sup>214</sup>*See* Geslewitz, *supra* note 172, at 62 ("[N]ot all of *Wards Cove* was legislatively reversed. . . . that portion of *Wards Cove* that adopted stricter statistical standards for proving disparate impact . . . is still good law.").

<sup>215</sup>*See, e.g.,* E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (overturning an EEOC finding of discrimination for failing to account for language and cultural practices in Hispanic neighborhood; EEOC simply compared percentage of black employees to black population in neighborhood); Geslewitz, *supra* note 172, at 62 ("Although this decision immediately preceded the passage of the Act, it would appear that the Seventh Circuit's analysis might not be affected by the Act's new requirements.").

<sup>216</sup>*See generally* SCHLEI & GROSSMAN, *supra* note 4, ch. 4 (reviewing development of objective testing).

<sup>217</sup>Civil Rights Act of 1964 (as amended), § 703(h) (codified at 42 U.S.C. 2000e-2(h) (1992)).

the continued use of tests, but they do forbid the practice of race-norming, or adjusting test scores by minority category.

Under the practice of race-norming, raw test scores are converted to a percentile within a racial or ethnic group for comparison with other groups. The percentile scores within each ethnic group then are compared with the percentile scores of other groups. In a use of race normed tests as the sole hiring criterion, for example, a black could achieve a raw score of **22** that is in the 80th percentile for blacks; a Hispanic scores **19**, placing him in the 86th percentile for Hispanics; and a Caucasian scores **42**, which is in the 76th percentile for Caucasians. The Hispanic would receive the job based on the highest percentile ranking, 85th, although he had the lowest raw score. Some courts have ordered this type of race-norming to redress disparate impact in discrimination suits.<sup>218</sup>

Section 106 of the 1991 Act appears to make the practice of race-norming illegal:

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.<sup>219</sup>

Although this section's meaning appears to be clear, opposing congressional articulations of "intent" require reconciliation. Senator Dole's memorandum, for example, supports the literal and broad interpretation of section 106:

Section [106] means exactly what it says: race-norming or any other discriminatory adjustment of scores or cutoff points of any employment related test is illegal. This means, for instance, that discriminatory use of the Generalized Aptitude Battery (GATB) by the Department of Labor's [sic] and state employment agencies' [sic] is illegal. It also means that race-norming may not be ordered in any case, nor may it be approved by a court as part of a consent decree, when done because of the disparate impact of those test scores.<sup>220</sup>

This interpretation prohibits the practice of race-norming altogether

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<sup>218</sup> See, e.g., *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991), cert. denied, 112 S. Ct. 337 (1991) (involving hiring and promotion testing for police department).

<sup>219</sup> Civil Rights Act of 1991, § 106 (codified at 42 U.S.C. § 2000e-2(l) (1992)).

<sup>220</sup> 137 CONG. REC. S15,476 (daily ed., Oct. 30, 1991).

and is consistent with a literal reading of section 107 prohibiting affirmative action.<sup>221</sup> Senator Danforth and Representative Edwards disagree with Senator Dole's interpretation. They believe this section allows race-norming in certain circumstances.

By its terms, the provision applies only to those tests that are "employment related." Therefore, this section has no effect in disparate impact suits that raise the issue of whether or not a test is, in fact, employment related. The prohibitions of this section only become applicable once a test is determined to be employment related.<sup>222</sup>

This interpretation requires "employment related tests" to be defined as "job related for the position in question and consistent with business necessity" from section 105(a). This definition leads to several anomalies that will generate additional unnecessary litigation.

The Danforth-Edwards interpretation would allow race-norming of tests that have inconsequential relation to employment decisions. This type of employment practice could not cause a disparate impact and therefore would not be "employment related" under section 106.<sup>223</sup> This possibility is rather remote, however, because few employers would incur the trouble and expense of testing that had insignificant value in employment decisions and raised potential issues for litigation.

The second permissible use of race-norming under the Danforth-Edwards interpretation is more confusing, circular, and far more onerous on employers. The "logic" is that some tests have no disparate impact and require no race-norming. Most tests do, however, disparately impact on certain groups. Race-norming these tests might be required to meet the business necessity test and avoid liability under section 105. This interpretation places employers in a "lose-lose" position: use tests without norming and risk failing the business necessity test under section 105, or race-norm the test and risk liability under section 106 if it satisfies the section 105 employment related, business necessity test. This interpretation also requires an employer to argue against itself by proving the test is not justified by "business necessity" under section 105.

Section 106 was another part of the compromise for President Bush's "quota" objection. It actually was proposed by the civil rights

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<sup>221</sup> See *infra* section V.

<sup>222</sup> 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991); 137 CONG. REC. H9529 (daily ed. Nov. 7, 1991).

<sup>223</sup> Cathcart & Snyderman, *supra* note 25, § VIII.A.

lobby to placate the Administration's objections.<sup>224</sup> The prohibition against race-norming does not limit an employer's use of testing, only the use of race-adjusted scores. The significance of the difference is tied to an employer's ability to use subjective criteria in employment decisions. Whether protected status can be one of the subjective criteria is precisely the issue raised under section 107 of the 1991 Act: are affirmative action programs still legal?

#### IV. Mixed Motive Cases—An End to Affirmative Action?

*It doesn't matter whether a cat is black or white as long as it catches mice.*

Deng Ziaopeng<sup>225</sup>

The complex issues involved in the so-called "mixed motive" cases have "left the [courts] in **disarray**."<sup>226</sup> In these suits, a plaintiff proves the employer was motivated to some degree by prohibited reasons when taking a personnel action. The employer rebuts the plaintiff's case by proving a legitimate reason for taking the action and that it would have taken the action without the prohibited reason. The presence of both valid and invalid motivations for the action gives rise to the title "**mixed-motive**."<sup>227</sup> The changes in the 1991 Act further complicate this confusing area and also call into question the continued legality of voluntary affirmative action programs.<sup>228</sup>

Mixed motive cases arise not only under Title VII, but also in labor relations and other areas of employment law.<sup>229</sup> Although the "evil" involved is similar in these areas, Congress has been inconsistent in legislating how courts should analyze these actions. The new mixed motive standards in the 1991 Act continue this record of

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<sup>224</sup>Forman, *supra* note 26, n.237.

<sup>225</sup>Mark Starr, *Emerson: 'I Hate Quotations,'* NEWSWEEK, Mar. 12, 1990, at 75, 76.

<sup>226</sup>Price Waterhouse v. Hopkins, 490 U.S. 228, 238 (1989) (Brennan, J.).

<sup>227</sup>The EEOC has defined mixed motive cases as those where "the evidence shows that the employer acted on the basis of both lawful and unlawful reasons." Equal Employment Opportunity Comm'n Directive 915.002, *Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, (July 14, 1992), 1992 WL 189088, \*5 [hereinafter EEOC Revised Guidance].

<sup>228</sup>Cathcart & Snyderman, *supra* note 25, § IV.

<sup>229</sup>Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. § 2302 (b)(8) (1992) (applying a "contributing factor" test that can be defeated by "clear and convincing evidence" in cases of reprisal against federal employees); NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983) (applying mixed motive analysis to retaliatory discharge under National Labor Relations Act).

"consistent inconsistency." These changes to Title VII mixed motive analysis have received less publicity than other changes in the 1991 Act, but have an even greater "potential for mischief and abuse."<sup>230</sup>

### A. Setting the Stage for the 1991 Act

Mixed motive issues are no stranger to employment law. The Supreme Court has consistently applied a "but for" test of liability in these cases; employers are not liable unless the prohibited basis was the actual motivation for the action. Under the National Labor Relations Act,<sup>231</sup> for example, an employer can avoid liability in a disciplinary action motivated in part by anti-union sentiment by demonstrating a valid basis was the motivating reason for the action.<sup>232</sup> The same rule applies under 42 U.S.C. § 1983 cases of retaliatory discharge<sup>233</sup> and wage discrimination claims under the Equal Pay Act.<sup>234</sup> Congress recently codified this liability limiting analysis for prohibited personnel practices involving federal employees in the Whistleblower Protection Act of 1989.<sup>235</sup> The 1989 decision in *Price Waterhouse v. Hopkins*<sup>236</sup> was, however, the Supreme Court's first mixed motive opinion under Title VII.

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<sup>230</sup> Geslewitz, *supra* note 172, at 63. See Shannon, *supra* note 146, at 21:

Perhaps more than any other issue in the [1991 Act], mixed motive decisions provide the greatest potential for increasing Title VII and ADA litigation. Hiring and promotion decisions for executive and professional positions often involve a myriad of objective and subjective criteria. Many representatives of the employer are involved in the decision-making process. A plaintiff will often be able to find someone whose input into the process was motivated by discrimination. Identifying that one unlawfully motivated contributing individual assures minimum liability.

<sup>231</sup> 29 U.S.C. §§ 151-187 (1992).

<sup>232</sup> See, e.g., NLRB, 462 U.S. at 400 ("[T]he employer could avoid [liability] by proving by a preponderance of the evidence that . . . the employee would have lost his job in any event."); *accord* Hall v. NLRB, 941 F.2d 684, 688 (8th Cir. 1991) (finding the protected conduct "would have brought about the same result even without the illegal motivation.").

<sup>233</sup> See *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (holding that the employer established it would have reached the same decision and was not liable for discharge motivated in part by retaliation for employee's exercising First Amendment Rights); see also *Warren v. Department of the Army*, 804 F.2d 654, 658 (Fed. Cir. 1986) (requiring action to be motivated by "predominantly retaliation" and causally connected to retaliation in whistleblower reprisal before the Whistleblower Protection Act of 1989).

<sup>234</sup> 29 U.S.C. § 206(d)(1) (1992) (stating differential must be discrimination "on the basis of sex"). See generally *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); SCHLEI & GROSSMAN, *supra* note 4, §17.5.

<sup>235</sup> Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. § 2302 (b)(8) (1992)). A violation is established if the employee proves by a preponderance of the evidence that the protected activity "was a contributing factor in the personnel action." 5 C.F.R. § 1209.7(a) (1992). The agency can rebut the employee's proof and avoid all liability by showing "by clear and convincing evidence that it would have . . . taken the same personnel action in the absence of the [protected activity]." 5 C.F.R. § 1209.7(b) (1992).

<sup>236</sup> 490 U.S. 228 (1989).

The plaintiff in *Price Waterhouse* was a senior female associate in the large accounting firm. She alleged that the firm deferred her for consideration to partner based on her sex. She later resigned her position, and the Circuit Court of Appeals for the District of Columbia held that the firm's failure to renominate her for partner amounted to constructive discharge based on sex discrimination.<sup>237</sup> The Supreme Court reversed and remanded the case because the circuit court had required Price Waterhouse to prove by clear and convincing evidence that it would have made the same decision without consideration of gender.<sup>238</sup>

A plurality of the Court held in *Price Waterhouse* that a Title VII employee initially must prove that discrimination played a "motivating part" in the decision.<sup>239</sup> The employer then has the burden of *persuasion* to prove by a preponderance of the evidence that it would have made the same decision absent the prohibited discrimination.<sup>240</sup> The employer "must show that its legitimate reason, standing alone, *would have* induced it to make the same decision."<sup>241</sup>

Both the plurality decision and the dissent in *Price Waterhouse* discussed at great length the causation factor in disparate treatment analysis. At the center of the controversy was the meaning of the words "because of" in section 703 of the Civil Rights Act of 1964. This section prohibits an employer from making employment decisions regarding an employee's "conditions or privileges of employ-

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<sup>237</sup> *Price Waterhouse v. Hopkins*, 825 F.2d 458 (D.C. Cir. 1987). The lower courts may have been influenced somewhat by the under-representation of women in the firm. At the time of the plaintiff's consideration for partner, only seven of 662 partners were women. 490 U.S. at 232-33. Of the 47 candidates considered for partner with the employer, only one—the plaintiff—was a woman. *Id.* at 233. There was ample evidence, however, that factors other than sex were involved. One reviewing partner at Price Waterhouse described the plaintiff as "universally disliked," and another described her as "consistently annoying and irritating." *Id.* at 236.

<sup>238</sup> *Id.* at 260.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* This shifting of the burden of proof was new to disparate treatment analysis, which previously had imposed only a burden of *production* on the employer to state a valid, nondiscriminatory reason for its action. See *supra* notes 123-124 and accompanying text (elements of a disparate impact analysis). This departure from previously accepted precedent was highlighted in Justice O'Connor's concurrence and in the dissent of Justices Kennedy and Scalia and Chief Justice Rehnquist. See, e.g., *Price Waterhouse* 490 U.S. at 279 ("Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in [prior disparate treatment cases] is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent.") (Scalia, J., dissenting).

<sup>241</sup> *Id.* at 252 (emphasis added). The dissenting opinion advocated a "could have" test, which would allow an employer to justify its actions based on information not known at the time of the alleged discriminatory act but which "could have" justified the challenged act if known. See *id.* at 280.

ment . . . or otherwise adversely affect[ing] his status as an employee, *because* of such individual's race, color, religion, sex, or national origin."<sup>242</sup> The plurality believed that this section does not create a "but-for" test of causation.<sup>243</sup> The dissent adamantly argued it does.<sup>244</sup>

### *B. The Changes of the 1991 Act—Liability Without Causation*

The changes to mixed motive law in the 1991 Act are both troubling and perplexing. In *Price Waterhouse*, the Court created a new test favoring plaintiffs in disparate treatment suits. Although the case involved gender discrimination, the new burden-shifting analysis applied not only to retaliation claims<sup>246</sup> and other bases of discrimination under Title VII, but also to other antidiscrimination laws,<sup>246</sup> to which the courts apply Title VII case law by analogy. Perhaps Congress was concerned with the strength of the dissent and the uncertain plurality in *Price Waterhouse* when it decided to confuse an area of employment discrimination law that finally had been clarified.

Instead of limiting liability in mixed motive cases, as did the *Price Waterhouse* Court, the 1991 Act imposes an irrebuttable presumption of liability in all mixed motive cases. Section 107 of the 1991 Act is titled, paradoxically, "Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices" and states, in pertinent part: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."<sup>247</sup> This change goes much further than did the plurality's decision in *Price Waterhouse*. Instead of shifting the burden to the employer to disprove causation, a plaintiff

<sup>242</sup> 42 U.S.C. § 2000e-2(a)(1) (1992) (emphasis added).

<sup>243</sup> *Price Waterhouse*, 490 U.S. at 239–46.

<sup>244</sup> See *id.* at 280–81 ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.") (citing W. KEETDN, ET AL., PROSSER AND KEETDN ON LAW OF TORTS 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.")).

<sup>245</sup> See SPECIAL RELEASE, *supra* note 17, at 35 (citing 42 U.S.C.A. § 2000e-3 (1988)); see also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985).

<sup>246</sup> See SPECIAL RELEASE, *supra* note 17, at 36; see also *Perry v. Kunz*, 878 F.2d 256 (8th Cir. 1989) (applying the *Price Waterhouse* test to the Age Discrimination in Employment Act); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991) (requiring direct evidence in mixed motive test under Title VII).

<sup>247</sup> Civil Rights Act of 1991, § 107(a) (codified at 42 U.S.C. § 2000e-2(m) (1992)). See generally 137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991).

now establishes a *violation* by demonstrating a prohibited basis was a “motivating factor” in the decision.

A plaintiff who successfully demonstrates a discriminatory “motivating factor” in an employment practice may receive declaratory relief, injunctive relief, and attorney’s fees and costs under section 107.248 In effect, this creates a “safety net” for all plaintiffs; they recover their costs without proving a prohibited reason caused any harm. The employer may only avoid the additional Title VII remedies of reinstatement, promotion, backpay, and compensatory and punitive damages by demonstrating that the employer *would* have taken the same action without consideration of the discriminatory factor.<sup>249</sup> An employer may not avoid this liability by demonstrating a legitimate basis for the decision discovered after the discriminatory act—a “could have” test—as proposed by the dissent in *Price Waterhouse*.<sup>250</sup>

Although it departs from the Supreme Court’s analysis in *Price Waterhouse*, section 107 of the 1991 Act reflects the holdings of several circuit courts and a position advocated by a minority of “remedies limiting” commentators.<sup>251</sup> These cases and writings do not, unfortunately, begin to answer all the questions created by the new law. The courts will confront many complex and varied issues raised by section 107, the first of which may be filling in the void Congress left by failing to define “motivating factor.”

**1. Substantial v. Motivating—A Real Difference?**—In her concurrence in *Price Waterhouse*, Justice O’Connor diverged from the plurality decision on the plaintiff’s burden in establishing a mixed

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<sup>248</sup>Civil Rights Act of 1991, §107(b) (codified at 42 U.S.C. §2000e-5(g)(3)(B)(ii) (1992)).

<sup>249</sup>*Id.* Compensatory and punitive damages also are a new addition to Title VII from the 1991 Act. *See infra* section V.

<sup>250</sup>*Price Waterhouse v. Hopkins*, 490 U.S. 228, 280–81. *See also* *EEOC v. Alton Packing Co.*, 901 F.2d 920, 926 (11th Cir. 1990) (holding that better qualified candidate who applied for position and **was** selected after nonpromotion of plaintiff was not a defense to employer’s decision not to promote plaintiff, but employer proved other valid reason for nonpromotion by preponderance). The EEOC has proposed a novel approach for cases involving valid after-acquired evidence: the employer is shielded from reinstating a terminated employee but would be liable for back pay and compensatory damages up to the date when the valid basis was discovered. Such a plaintiff could also be entitled to punitive damages. EEOC Revised Guidance, *supra* note 227, at ‘8.

<sup>251</sup>*See, e.g.*, *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165–66 (9th Cir. 1984); *Bibbs v. Block*, 778 F.2d 1318, 1320–24 (8th Cir. 1985) (en banc); *Brodin, The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990). *Contra* Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235 (1988).

motive violation. She believed that the proper standard requires a showing "that an illegitimate criterion was a *substantial* factor in an adverse employment decision."<sup>252</sup> She also would require "direct evidence" of discrimination that could not include "stray remarks" or "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself."<sup>253</sup>

The 1991 Act adopts the "motivating factor" test of the plurality in *Price Waterhouse*<sup>254</sup> but lacks a definition for "motivating." This test initially appears to be at odds with the "substantial factor" test, but the difference may be minimal. The apparent conflict between the tests applied by the plurality and the concurrence might be explained by the Court's prior use of the terms "motivating" and "substantial."

In *Mount Healthy City Board of Education v. Doyle*,<sup>255</sup> the Court used the terms motivating and substantial interchangeably. Later cases applying the *Mount Healthy* standard also failed to distinguish a substantive difference between a "motivating factor" and a "substantial factor."<sup>256</sup> Justice Brennan even used "substantial" to describe the plaintiff's burden at one point in *Price Waterhouse*.<sup>257</sup> What initially appears to be a disagreement between the concurring and plurality decisions in *Price Waterhouse* is actually a case of different Justices using substantively equivalent terms.

The lower courts also have freely mixed the terms "motivating" and "substantial" in mixed motive analysis. In *Conaway v. Smith*,<sup>258</sup> the Tenth Circuit required proof of either "a substantial or

<sup>252</sup> *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring). Justice White also supported use of the "substantial factor" test in his concurrence. *Id.* at 259-60 (White, J., concurring).

<sup>253</sup> *Id.* at 276-77.

<sup>254</sup> Civil Rights Act of 1991, §107(b) (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1992)).

<sup>255</sup> 429 U.S. 274, 286 (1977). The plaintiff in *Mount Healthy* alleged that he had been discharged as a public school teacher for exercising his free-speech rights under the First Amendment. The Court held that an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." The Court did not believe it should "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285.

<sup>256</sup> See, e.g., *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 416 (1979) (applying "substantial factor" test); *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 266 (1977) (holding that the test is "whether invidious discrimination was a *motivating factor*") (emphasis added); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (using both "motivating or substantial factor").

<sup>257</sup> *Price Waterhouse*, 490 U.S. at 230.

<sup>258</sup> 853 F.2d 789, 795 (10th Cir. 1988) (applying *Mount Healthy* test for retaliatory discharge).

motivating factor.” The Fourth Circuit appears to prefer the “substantial factor” test, but in *White v. Federal Express Corp.*,<sup>259</sup> it cited Justice White’s concurrence in *Price Waterhouse* as authority instead of Justice O’Connor’s opinion. The Sixth Circuit covers both bases by requiring evidence that “unlawful discriminatory animus was a Substantial motivation.”<sup>260</sup> The Second Circuit similarly will accept evidence that discrimination played either a motivating or substantial role in the decision.<sup>261</sup> The district courts are at least as thoroughly confused over any distinction between “motivating” and “substantial.”<sup>262</sup>

The determining discriminatory factor, whether labeled “motivating” or “substantial,” also must be proven by *direct* evidence.<sup>263</sup> This involves a two-step process: first, the plaintiff must present direct evidence of a discriminatory motive; next, the plaintiff must demonstrate that the employer “*actually relied on*” the prohibited factor in making the decision.<sup>264</sup> Stray remarks or comments made by nondecisionmakers—“discrimination in the air”—is insufficient; “the discrimination must be shown to have been ‘brought to ground’ and visited upon an employee.”<sup>265</sup>

Whether applying the “Substantial factor” or “motivating factor” test, the courts must strictly apply the direct evidence test and read into section 107 a certain *de minimis* causation threshold.<sup>266</sup>

<sup>259</sup> 939 F.2d 157, 159 (4th Cir. 1991) (citing *Price Waterhouse*, 490 U.S. at 259-60, (White, J., concurring)). *Accord* Visser v. Packer Eng’g Ass’n., 924 F.2d 655, 658 (7th Cir. 1991) (applying Substantial factor in age discrimination suit).

<sup>260</sup> *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991) (applying test in age discrimination action analyzed under *Price Waterhouse*) (citing *Gagne v. Northwestern Nat’l Ins. Co.*, 881 F.2d 309, 315-16 (6th Cir. 1989)).

<sup>261</sup> *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992); *but see* *Ostrowski v. Atlantic Mutual Ins. Co.*, No. 91-7674 (2d Cir. 1992) (requiring showing of a motivating factor).

<sup>262</sup> *See, e.g.*, *Dinwiddie v. Jefferson Elementary School Dist.*, 1992 U.S. Dist. LEXIS 19150, \*8 (N.D. Cal. 1992) (holding that mixed motive cases require proof “that a protected characteristic ‘played a motivating part.’”) (quoting *Price Waterhouse*, 490 U.S. at 244, n.12); *Dennis v. New York City Police Dep’t*, 1992 U.S. Dist. LEXIS 10085, \*21 (S.D.N.Y. July 13, 1992) (motivating part); *Pagana-Fay v. Washington Suburban Sanitary Comm’n*, 797 F. Supp. 462, 474 (D. Mary. 1992) (“a motivating and Substantial factor”) (dicta); *Kelber v. Forest Elec. Corp.*, 799 F. Supp. 326, 332 (S.D.N.Y.) (motivating or substantial); *Collins v. Outboard Marine Corp.*, 808 F. Supp. 590, 596 (N.D. Ill. 1992) (citing *Price Waterhouse* but specifying no particular test for mixed motive cases).

<sup>263</sup> *Price Waterhouse*, 490 U.S. at 251.

<sup>264</sup> *Id.* *See* EEOC Revised Guidance, *supra* note 227, at \*3 (“[A] link must be shown between the employer’s proven bias and its adverse action.”).

<sup>265</sup> *See* EEOC Revised Guidance, *supra* note 227, at \*3 (quoting *Price Waterhouse*, 490 U.S. at 251); *see also* *Randle v. LaSalle Telecommunications*, 876 F.2d 563, 569 (7th Cir. 1989) (holding that direct evidence must pertain to both intent and specific employment decision involved).

<sup>266</sup> *Cathcart & Snyderman*, *supra* note 25, §IV.B.; *see* *Shannon*, *supra* note 146, at 20.

Based on prior Supreme Court case law, which has not been overruled, "motivating" will be defined as "a determining factor" or a "substantial factor" in the challenged decision-making process; a circumstantial evidence analysis is simply inapplicable.<sup>267</sup> This application would limit recovery of costs to truly mixed motive cases and prevent a perception of "cost-free, risk-free" litigation. Any other analysis would shatter the base of case law interpreting mixed motive cases and cause even greater injustice to employers already facing liability without causation.

**2. The Litigation Two-Step.**—The new mixed motive shifting-burdens evidentiary test established in *Price Waterhouse* and codified in the 1991 Act presents some very practical problems for the lower courts. Under this new procedure, "a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."<sup>268</sup> Until *Price Waterhouse* and the 1991 Act, courts heard all issues of law and fact<sup>269</sup> and applied derivations of one test in all disparate treatment cases.<sup>270</sup> Lower courts now must determine which, or how many, of several tests apply, what matters the jury will decide, and how to conduct the litigation procedurally.<sup>271</sup> What previously was difficult has now become a litigation nightmare.

Title VII plaintiffs now will always argue their cases in the alternative. They will argue first that discrimination was the sole motivation, alleging direct, and then circumstantial proof, under the *McDonnell-Douglas* prima facie test. In the alternative, plaintiffs will argue that mixed motive analysis applies. Both the plurality and dissent opinions in *Price Waterhouse* recognized the potential evidentiary problems this scenario would raise, but the plurality believed that courts and juries were up to the challenge.<sup>272</sup> The

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<sup>267</sup> See Shannon, *supra* note 146, at 20.

<sup>268</sup> *Price Waterhouse*, 490 U.S. at 230.

<sup>269</sup> See, e.g., *Lehman v. Nakshian*, 453 U.S. 156, 164 (1982) ("[O]f course . . . there is no right to trial by jury in cases arising under Title VII."); but see *Lytle v. Household Mfg.*, 494 U.S. 545, 548 (1990) ("This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial."); see also SCHLEI & GROSSMAN, *supra* note 4, at 427.

<sup>270</sup> *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff's prima facie case consists of the following three elements: (1) that the employee engaged in protected activity; (2) that the employer took adverse employment action against the employee; and (3) that a causal connection existed between the protected activity and the adverse action.

<sup>271</sup> See *infra* section V (developing the issue of jury trials more fully).

<sup>272</sup> *Price Waterhouse*, 490 U.S. at 247. Justice Brennan wrote the following for the plurality:

Nothing in this opinion should be taken to suggest that a case must be

modifications in the 1991 Act unfortunately cloud the plurality's picture of a logical analysis of these cases.

Cases involving direct evidence present the fewest problems for the courts, although these cases still bear thorns. The plaintiff who demonstrates discriminatory motive by direct evidence is entitled to full Title VII damages unless the employer proves it would have taken the same action for a legitimate reason. If the employer meets this burden, section 107 limits damages to declarative relief, injunctive relief, and attorneys' fees and costs.<sup>273</sup> This much of the law is clear; less clear is how the courts will reach their verdicts *procedurally* in these easy cases.

The courts will have various options in reaching the mixed motive conclusion: decide itself whether a case involves mixed motives as a matter of law; bifurcate the proceedings and have the jury determine the threshold issue of mixed motives (dismissing the

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correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. . . . Juries long have decided cases in which defendants raised affirmative defenses.

*Id.*

The dissent disagreed and was concerned over the complexity of the procedures, stating:

Although the Price Waterhouse system is not for every case, almost every plaintiff is certain to ask for a Price Waterhouse instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. . . . Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process.

*Id.* at 290 (Scalia, J., dissenting).

<sup>273</sup>Civil Rights Act of 1991, §107(b) (codified at 42 U.S.C. § 2000e-5(g)(3)(B) (1992)). Opponents of the damages changes in the 1991 Act objected to awarding attorney's fees and costs, which can be substantial, to a plaintiff who had not been "harmed" by discrimination. See 137 CONG. REC. S15,468 (daily ed. Oct. 30, 1991) (statement of Sen. Symms) ("[H]uge monetary award amounts are encouraged through jury trials, eliminating any incentive for the plaintiff and defendant to settle early. And with legal and expert fees allowed, there is no incentive for the lawyer to settle either."); *id.* at 15,483 (statement of Sen. Simpson) (expressing concern that trial attorneys will intentionally prolong litigation to increase fees).

jury if it determines mixed motives present); or lump all the issues of mixed motive and damages together in one, multivolume instruction to the jury and let the jury take all responsibility for the outcome.<sup>274</sup> The lower courts undoubtedly will diverge and apply all three possibilities and create some new deviations of their own.<sup>275</sup>

The more common discrimination case involving the *McDonnell-Douglas* prima facie test will provide an even greater challenge for the courts. The plaintiff initially will argue that discrimination was the sole motivation for the employer's action. This opens the door for the full extent of Title VII damages, including compensatory and punitive damages,<sup>276</sup> and allows the plaintiff to request a jury trial.<sup>277</sup> The court then will apply its interpretation of the "direct evidence, motivating factor" test which, again, is subject to multiple procedural variations. A plaintiff who fails the direct evidence step will argue that a jury still should decide the facts under the rebuttable presumption test from *McDonnell-Douglas*.<sup>278</sup> Employers will argue, of course, that summary judgment always is appropriate when a plaintiff has failed to prove discrimination was a motivating factor for the action challenged and will move to strike a jury request.<sup>279</sup> Neither the Court in *Price Waterhouse* nor the 1991 Act clearly distinguished the evidentiary differences between the mixed motive analysis and the traditional *McDonnell-Douglas* test

In some cases, counsel for employers may attempt to establish a valid basis for the employer's practice and choose, tactically, to move for a limited summary judgment on mixed motives. This limits the potential liability to fees and costs and precludes a jury trial and potential reinstatement, backpay, and compensatory and punitive

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<sup>274</sup> The jury will not have authority, however, to decide the equitable remedies such as reinstatement, backpay, and declaratory relief, which remain within the purview of the court. See *infra* text accompanying notes 382-434 (discussion of the damages issue and procedural problems).

<sup>275</sup> See *infra* text accompanying notes 422-33 (discussion of the Seventh Amendment requirements).

<sup>276</sup> See *infra* section V for a more complete discussion.

<sup>277</sup> The 1991 Act allows any party to demand trial by jury "[i]f a complaining party seeks compensatory or punitive damages." Civil Rights Act of 1991, §102(c) (codified at 42 U.S.C. § 1981a(c) (1992)).

<sup>278</sup> See *supra* notes 247-65 for analysis of the direct evidence, motivating factor analysis.

<sup>279</sup> Cf. *Visser v. Packer Eng'g Assoc.*, 924 F.2d 655, 660 (7th Cir. 1991) ("Caution is required in granting summary judgment, especially under a statute that allows for trial by jury."). Plaintiffs will argue for at least a partial summary judgment on the issue of causation. If the discrimination did not motivate the challenged act, the plaintiff is not entitled to compensatory or punitive damages or a jury trial. The courts, already overburdened with drug-related cases, may be amenable to these partial summary judgments to avoid jury trials on the merits. The question will depend in part on the law of the circuit and Seventh Amendment considerations. See *infra* section V (discussion of jury trials and the Seventh Amendment).

damages.<sup>280</sup> Full summary judgment will be far less likely under a section 107 analysis.<sup>281</sup> Lower courts may be more amenable to the partial summary judgment as a type of "compromise" in weak cases; they avoid a jury trial but do not impose the full costs of litigation on the plaintiff.<sup>282</sup> The lower courts undoubtedly will be forced to wade through floods of these summary judgment motions and motions to strike jury demands before obtaining further guidance or reaching any consensus or deeper understanding of these issues.<sup>283</sup>

Congressional "tinkering" has resulted in a new level of "disarray" in the courts. "Race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."<sup>284</sup> Personality conflicts often give rise to employment disputes and difficult conditions for an employee, but such circumstances do not "translate into discrimination."<sup>285</sup> In his dissent in *Price Waterhouse*, Justice Scalia warned against "[a]ttempts to evade tough decisions by erecting novel theories of liability or multitiered systems of shifting burdens."<sup>286</sup> The mixed motive changes in the 1991 Act appear to be just such an attempt to avoid a firm finding for one party in a discrimination action.<sup>287</sup> These changes also raise new questions as to the validity of affirmative action programs.

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<sup>280</sup>If successful in limiting liability to the mixed motives remedies, employers' counsel then will attempt to discredit the plaintiff's "direct evidence" that discrimination was a "motivating factor." Their success depends on how the court hears the case procedurally.

<sup>281</sup>*Cathcart & Snyderman, supra* note 25, § IV.A.; *see* Geslewitz, *supra* note 172, at 63:

The practical effect of this change in the law may be to make employers vulnerable to even the weakest and most unsubstantiated claims. As long as an employee has the barest direct evidence that a supervisor had a discriminatory motive, then no matter how conclusive the employer's evidence of a nondiscriminatory reason for the discharge, the employee could still avoid dismissal of his lawsuit and hold out for a significant settlement on the chance that the jury would at least find that discrimination was 'a' motivating factor.

<sup>282</sup>*But see infra* notes 338-40 and accompanying text (discussion of potential damage and stigma to employers found guilty of "discrimination" without causation).

<sup>283</sup>*See* Fitzpatrick, *supra* note 5, at 233. The district courts have borrowed procedures from cases with dual causes of action amid the confusion over retroactivity and jury trial requirements. *See, e.g.,* Pagana-Fay v. Washington Suburban Sanitary Comm'n, 797 F. Supp. 462, 465 (D. Mary. 1992) (trying case before both a jury and the court simultaneously to avoid possible retrial).

<sup>284</sup>*Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (Scalia, J., dissenting); *see* Cathcart & Snyderman, *supra* note 25, § IV.A. ("Employment decisions of this sort are almost always mixed motive decisions turning on many factors.").

<sup>285</sup>*Pagana-Fay*, 797 F. Supp. at 473 (entering judgment notwithstanding the verdict for the defendant in sex discrimination suit).

<sup>286</sup>*Price Waterhouse v. Hopkins*, 490 U.S. 228, 295 (1989).

<sup>287</sup>In his dissent in *Price Waterhouse*, Justice Scalia aptly describes the "tough decision" facing courts in a discrimination suit:

### *C. An End to Affirmative Action?*

By prohibiting all employment practices that involve prohibited "motivating factors," section 107 of the 1991 Act appears to spell the end for affirmative action programs. These programs, by definition, intentionally grant hiring or promotion preference to individuals based on their protected status, which is precisely the definition of disparate treatment.<sup>288</sup> Civil rights advocates in Congress attempted to overcome this result by inserting additional "guidance" into the 1991 Act: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."<sup>289</sup>

Unfortunately, the 1991 Act does not provide a hint of what "law" is contemplated in this section. Applying the prior "law" disregards the radical changes contained in the 1991 Act and forces the courts to create a hypothetical law whenever an affirmative action program is at issue. If the definition of "law" is "as amended by the 1991 Act," then affirmative action programs would become illegal. The two provisions in the 1991 Act constitute a classic circular argument—one says you do, the other says you don't!<sup>290</sup> The EEOC perpetuates this circular reasoning by approving all affirmative action measures that "comply with the requirements set by the Supreme Court and the lower federal courts."<sup>291</sup> The "law" again appears to be what the courts say it is.

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Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees.

*Id.* at 294 (Scalia, J., dissenting).

<sup>288</sup>In disparate treatment discrimination, "The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." SCHLEI & GROSSMAN, *supra* note 4, at 27 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

<sup>289</sup>Civil Rights Act of 1991, § 116. The far-reaching advocate might argue that the comma preceding "that are in accordance with the law" makes that phrase nonrestrictive and, therefore, not an essential part of the sentence structure. Under this theory, all court-ordered remedies, affirmative action, and conciliation agreements would be unaffected by the 1991 Act. I simply will say that this section is poorly written and improperly punctuated and not attempt to infer any grammatical insight into the writer's "intent." For proper use of commas and the pronoun "that" in restrictive and nonrestrictive clauses and phrases, see WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE* 59 (3d ed. 1979) ("That is the defining, or restrictive pronoun."); see also HARBACE COLLEGE HANDBOOK § 12d at 139 (9th ed. 1984) ("The writer signifies the meaning [restrictive or nonrestrictive] by using or omitting commas [comma implies nonrestrictive].").

<sup>290</sup>See Cathcart & Snyderman, *supra* note 25, § IV.B.

<sup>291</sup>EEOC Revised Guidance, *supra* note 227, at \*9-10.

Not surprisingly, members of Congress could not agree on the meaning or intent of section 107 and again attempted to "clarify" the patent ambiguity by inserting contradictory interpretive memoranda into the record. Representative Edwards thought it was clear that section 107

is not intended to provide an additional method to challenge affirmative action. As Section 116 of the legislation makes plain, nothing in this legislation is to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law. This understanding has been clear from the time this legislation was first proposed in 1990, and any suggestion to the contrary is flatly wrong.<sup>292</sup>

This explanation fails to clarify what "law" the affirmative action program must be "in accordance with." Not surprisingly, Senator Dole believed that the section 107 prohibition "is equally applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences."<sup>293</sup>

President Bush further confused matters by releasing an informal statement apparently calling for the elimination of affirmative action, only to reverse his field during the formal signing ceremony for the 1991 Act. The day before signing the 1991 Act, the President's press corps circulated a statement calling for the elimination of "any regulation, rule, enforcement practice, or other aspect of these [equal employment opportunity] programs that mandates, encourages, or otherwise involves the use of quotas, preferences, set-asides, or other similar devices, on the basis of race, color, religion, sex or national origin."<sup>294</sup> The President altered his tone radically during the official signing ceremony, when he simply declared: "I support affirmative action. Nothing in the bill overturns the Government's affirmative action programs."<sup>295</sup>

Congressional sponsors of the 1991 Act recognized the internal conflict in the 1991 Act and issued a joint memorandum acknowledging their failure to provide appropriate guidance:

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<sup>292</sup> 137 CONG. REC. H9529 (daily ed. Oct. 30, 1991).

<sup>293</sup> 137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991).

<sup>294</sup> See Robert A. Sedler, *Employment Equality, Affirmative Action, and the Constitutional Political Consensus*, 90 MICH. L. REV. 1315, 1334-35 (1992) (citing Steven A. Holmes, Bush to Order End of Rules Allowing Race-Based Hiring, N.Y. Times, Nov. 21, 1991, at 1).

<sup>295</sup> Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1699, 1700 (Nov. 21, 1991). See Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at 1 (reporting President's counsel, C. Boyden Gray, prepared a draft statement ordering an end to use of racial preferences without conferring with either the President or his Chief of Staff John Sununu).

This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex or national origin, and thus "tend to deprive" other "individual[s] of employment opportunities . . . on the basis of race color, religion, sex, or national origin." In particular, this legislation should in no way be seen as expressing approval or disapproval of *United Steelworkers v. Weber*, 443 U.S. 193 (1979), or *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), or any other judicial decision affecting court ordered remedies.<sup>296</sup>

Congress again failed to take action on the issue and delegated responsibility for deciding the matter to the courts. To date, only one circuit court has entertained the issue.

Consistent with its position on retroactivity, the Ninth Circuit has held that the 1991 Act does not affect the legality of affirmative action programs under Title VII. In *Officers for Justice v. Civil Service Commission*,<sup>297</sup> the police officers' union of San Francisco, California challenged the city's use of "banded" test scores and a voluntary affirmative action program. The court cited *Johnson's* "manifest imbalance" test as authority for placing the burden on the union to prove the city's voluntary affirmative action program violated Title VII. Without extensive analysis, the court rejected application of section 107, finding that "[t]he language of the statute is clear, and the City's interpretation is consistent with that language."<sup>298</sup>

The Ninth Circuit's reliance on *Johnson* may be misplaced. Only

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296137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991), 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991). *Johnson* and *Weber* approved employer-initiated affirmative action programs favoring minorities and women based on a "manifest . . . imbalance in traditionally segregated job categories." *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

297979 F.2d 721, 725 (9th Cir. 1992), cert. denied, 493 U.S. 816 (1993). The Supreme Court denied certiorari without comment. See 59 Daily Lab. Rep. (BNA) A-1 (Mar. 30, 1993).

<sup>298</sup> *Officers for Justice*, 979 F.2d at 725. ("In reversing the result of those decisions, Congress did not state that it also sought to overturn affirmative action. '[A]bsent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.' *Johnson v. First Nat'l Bank*, 719 F.2d 270, 277 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984). Therefore, we conclude that the 1991 Act does not alter existing affirmative action case law."). The EEOC General Counsel now has adopted the Ninth Circuit's position for evaluating affirmative action programs. See *U.S. Equal Employment Opportunity Commission, Office of General Counsel Memorandum to All Regional Attorneys* (Feb. 22, 1993), reported in 34 Daily Lab. Rep. (BNA) E-1 (Feb. 23, 1993) [hereinafter EEOC General Counsel Memorandum].

Justices Stevens, Blackmun, and O'Connor remain from the plurality of the Court that decided the case, and at least three Justices would have overruled *Weber* because it encourages "reverse discrimination" when no evidence of a prior manifest imbalance exists.<sup>299</sup> The language in section 107 of the 1991 Act appears to reinforce Justice Scalia's dissent in *Johnson*<sup>300</sup> and could be the cornerstone for a new majority to invalidate voluntary affirmative action programs.

Justice Scalia highlighted in his dissent that the affirmative action program in *Johnson* involved "nontraditional" jobs for women<sup>301</sup> but still set specific guidelines and percentages for hiring the "proper" proportion of minorities—the dreaded "quota" practice.<sup>302</sup> Justice O'Connor voted with the plurality but vacillates between positions. She was dissatisfied with the plurality's analysis of the "statistical imbalance" required in affirmative action reviews,<sup>303</sup> but was swayed in *Johnson* by the qualifications of the selected female candidate. To justify most voluntary affirmative action programs, she still would require *direct* evidence of a "statistical disparity . . . sufficient for a *prima facie* Title VII case."<sup>304</sup>

<sup>299</sup> See *Johnson*, 480 U.S. at 632, 657 (White, J., dissenting), 676-77 (Scalia, J., dissenting) ("A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely permitting intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.").

<sup>300</sup> Justice Scalia would find compelling Section 107's mandate for a finding of discrimination "even though other factors also motivated the practice." Civil Rights Act of 1991, §107(a) (codified at 42 U.S.C. § 2000e-2(m) (1992)). See *Johnson*, 480 U.S. at 676 ("The practical effect of our holding is to accomplish de facto what the law . . . forbids anyone from accomplishing de jure: in many contexts it effectively requires employers, public as well as private, to engage in intentional discrimination on the basis of race or sex.") (Scalia, J., dissenting) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

<sup>301</sup> *Johnson* involved a voluntary affirmative action plan adopted in 1978 by the Santa Clara County (California) Transportation Agency that set as its goal "a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a work force whose composition reflects the proportion of minorities and women in the area labor force." *Johnson*, 480 U.S. at 619. Under the plan, a higher qualified man was passed over for a dispatcher position and a lesser qualified woman was hired.

<sup>302</sup> *Id.* at 660 ("Quite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined 'proper' proportion of each job category.").

<sup>303</sup> *Id.* at 655.

<sup>304</sup> *Id.* Despite the District Court's specific finding of fact that a woman had been hired based exclusively on her sex, Justice O'Connor accepted the employer's argument that sex was just a "plus factor" in the selection. *Id.* Many circuit courts and the EEOC have adopted Justice O'Connor's direct evidence test. See, e.g., EEOC Revised Guidance, *supra* note 227, at \*3, \*11; *Wilson v. Firestone Tire & Rubber Co.*,

Even without Justice O'Connor, those favoring greater scrutiny of voluntary affirmative action programs need find only two votes among Justices Kennedy, Souter, and Thomas—with Justice Thomas a near certain vote.<sup>305</sup> The circular reasoning between sections 107 and 116 may be sufficiently compelling for the Court to adopt Justice Scalia's "do what I say, not what I intended to say" approach to statutory interpretation.<sup>306</sup> Because Congress failed to address conscious minority hiring practices in the 1991 Act, the Supreme Court "is free to modify or overrule" its prior holdings on affirmative action.<sup>307</sup>

Another factor in the future viability of affirmative action programs is the level of judicial scrutiny applied. The Court decided *Johnson* only under Title VII; the plaintiff simply failed to raise the equal protection issue in the district court.<sup>308</sup> The Court therefore applied the lower scrutiny *prima facie* test of *McDonnell-Douglas*, which required the employer only to articulate a valid non-discriminatory reason for its decision, and that burden was satisfied by the use of an affirmative action plan.<sup>309</sup> The shifting burdens test

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932 F.2d 510, 514 (6th Cir. 1991); *Jones v. Gerwens*, 874 F.2d 1534, 1539 n.8 (11th Cir. 1989); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1313 n.2 (7th Cir. 1989); but see *Visser v. Packer Eng'g Assoc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc) (finding no discrimination but stating in dicta that "The proverbial 'smoking gun' is not required."); cf. *White v. Federal Express Corp.*, 929 F.2d 157, 160 (4th Cir. 1991) (per curiam) (finding plaintiff's burden satisfied "by any sufficiently probative direct or indirect evidence.").

<sup>305</sup> In his final opinion as a circuit court judge, Justice Thomas (joined by Judge James Buckley, with Chief Judge Abner Mikva dissenting) overturned a Federal Communications Commission policy providing preferential licensing to women. Justice Thomas found that the policy denied equal protection to white men. *Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) ("Any 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence").

<sup>306</sup> See, e.g., *Johnson*, 480 U.S. at 671 (stating that the Court often proceeds based on "the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.") (Scalia, J., dissenting).

<sup>307</sup> *Sedler*, *supra* note 294, at 1335.

<sup>308</sup> *Johnson*, 480 U.S. at 620 ("No constitutional issue was either raised or addressed in the litigation below.").

<sup>309</sup> *Johnson*, 480 U.S. at 627, where the Court stated as follows:

This case also fits readily within the analytical framework set forth in *McDonnell-Douglas Corp. v. Green*. Once a plaintiff establishes a *prima facie* case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan.

of Price Waterhouse and section 107 of the 1991 Act could force an employer, however, to demonstrate the underlying basis of an affirmative action plan, "requiring the employer to carry the burden of proving the validity of the plan."<sup>310</sup>

Since the inception of affirmative action in *Bakke*,<sup>311</sup> the Supreme Court has struggled to justify the concept within the law.<sup>312</sup> In her concurrence in *Johnson*, Justice O'Connor states that "Section 703 [of the Civil Rights Act of 1964] has been interpreted by Weber and succeeding cases to permit what its language read literally would prohibit."<sup>313</sup> Even Justice Stevens recognized that his opinion supported "an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation."<sup>314</sup> Instead of supporting the Court's prior interpretation of Title VII with a codification of the parameters for affirmative action, however, Congress has made it more difficult for the Court to rewrite "the statute it purport[s] to construe."<sup>315</sup>

Many see affirmative action as a perversion of the individual right to equal employment opportunity that unlawfully grants

That does not mean, however, **as** petitioner suggests, that reliance on an affirmative action plan is to be treated **as** an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

<sup>310</sup>*Id.* at n.144. In *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), the D.C. Circuit applied a mid-level scrutiny test to overturn the plan involved there.

<sup>311</sup>*Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). Critics often cite the legislative history of the Civil Rights Act of 1964 **as** support for their attack on affirmative action. *See Johnson*, 480 U.S. at 643 n.2 ("Title VII was intended to 'cover white men and white women and **all** Americans,' 110 CONG. REC. H2578 (1964) (remarks of Rep. Celler), and create an 'obligation not to discriminate against whites,' *id.* at 7218 (memorandum of Sen. Clark).") (Stevens, J., concurring).

<sup>312</sup>The EEOC has recognized that the literal language of the 1991 Act would not allow affirmative action, but it has chosen to interpret the Act otherwise:

If Section 116 saves only those affirmative action measures that are consistent with the new amendments, then it in fact saves nothing at all, and is rendered useless. For the section to serve any purpose, it should have to be read to protect affirmative action plans that are in accordance with the law as it exists without reference to Section 107.

EEOC Revised Guidance, *supra* note 227, n.32.

<sup>313</sup>*Johnson*, 480 U.S. at 646.

<sup>314</sup>*Id.* at 644 (Stevens, J., concurring).

<sup>315</sup>*Id.* at 616 (Scalia, J., dissenting) (criticizing the majority's reliance on congressional inaction to support its interpretation of affirmative action):

This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law **as** enacted meant. To make matters worse, it assays the current Congress' desires with respect to the particular provision in isolation, rather than (the way the provision **was** originally enacted) **as** part of a total legislative package containing many quids pro quo.

minorities a right to proportional representation in the labor force.<sup>316</sup> Others see it as a hypocritical policy doomed to fail for a society supposedly pledged to equal protection of its laws for all citizens.<sup>317</sup> Supporters of affirmative action see hiring quotas as appropriate "fair share" representation for minorities and women at every level of the workforce.<sup>318</sup> Affirmative action advocates generally discount the value of merit and superior qualifications in hiring decisions; they recognize that the policy is unfair to individual white males but justified by policy concerns, no matter how great the disparity in qualifications.<sup>319</sup> It should come as no surprise that "[t]he average white American believes civil rights legislation is preference legislation."<sup>320</sup>

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<sup>316</sup> See, e.g., BELZ, *supra* note 12, at 17:

The Civil Rights Act of 1964 was intended to establish color-blind equal employment opportunity through a combination of voluntary compliance, agency conciliation, and judicial enforcement in civil litigation of the personal right of individuals not to be discriminated against because of race. . . . [F]ederal courts . . . fashioned an administrative-judicial enforcement scheme that forced employers to give preferential treatment to racial and ethnic minorities under a new theory of discrimination based on the concepts of group rights and equality of result.

See also *Johnson*, 480 U.S. at 658:

The Court today completes the process of converting this from a guarantee that race or sex will not be the basis for employment determinations, to a guarantee that it often will. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace.

(Scalia, J., dissenting).

<sup>317</sup> MELVIN I. UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION* 38 (1991). Professor Urofsky also questions whether affirmative action is either the proper policy to achieve race and gender equality or fair—even in an admittedly white-male-dominated society. *Id.* at 23–29.

<sup>318</sup> Sedler, *supra* note 294, at 1330. Mr. Sedler, a renowned champion of affirmative action, also believes that a "constitutional political consensus" supports affirmative action in this country and, without addressing the implications of section 107, concludes this consensus was "reaffirmed in the passage and enactment of the Civil Rights Act of 1991." *Id.* at 1336.

<sup>319</sup> See *id.* at 1320. Mr. Sedler states:

However, the fact remains that the gains made by racial minorities and women through affirmative action will come at the expense of white males . . . who but for affirmative action would have received the job in question. The degree of 'qualification disparity,' if any, between the white male denied the job and the minority person or woman who gets it is irrelevant.

See also RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* (1992) (supporting affirmative action based on a hypothetical "distributive justice" model of what society would look like without discriminatory practices).

<sup>320</sup> Steve Daley, *House Demos OK Rights Bill, But Bush Calls It a Win*, CHI. TRIB., June 6, 1991, at C1 (quoting Representative Vin Weber).

Opposition to affirmative action is not restricted to "Caucasian theorists." Professor Stephen Carter of Yale University Law School believes that he is a "victim" of affirmative action because it is perceived that he succeeded because he was the "best black."<sup>321</sup> Carter believes that affirmative action has gone astray by abandoning relief for the poor minorities in favor of diversifying the white male professional world;<sup>322</sup> affirmative action programs, as applied, stray from the original goal of identifying minorities with potential and placing them in a position to be competitive in a truly equal employment environment.<sup>323</sup> These programs should strive instead to eliminate the "vestiges" of the nation's racist past by providing opportunities to young black people instead of buying off a few middle class blacks with law suit judgments and promotion quotas.<sup>324</sup>

Professor Carter is not alone in his perception that affirmative action programs fail to address minorities' problems in today's society. Affirmative action may be justified as a societal policy and necessary to remedy past discrimination.<sup>325</sup> The "whether," "why," and "how" of such a policy decision should be made by Congress, however, and not by individual courts. There is no "exception" in Title VII "equal opportunity" for affirmative action programs. Only after Congress defines its concept of "equal opportunity" under Title VII and what constitutes a "lawful" affirmative action program will the courts be able, with a societal goal, to consistently adjudicate Title VII cases. Congress, not the courts, must rewrite a law that "does not mean what it says,"<sup>326</sup> outline how our nation will overcome past discrimination, and define under what circumstances "reverse discrimination" is justified.<sup>327</sup> Until then, courts should apply the equal protections of Title VII literally: employment decisions must be based only on competence, qualification, experience, and non-

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<sup>321</sup>STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49-62 (1991) (describing his "best black" syndrome). Justice Thomas also has stated that he finds affirmative action programs "offensive." See Neil A. Lewis, *Thomas' Journey on Path of Self-Help*, N.Y. TIMES, July 7, 1991, at A12.

<sup>322</sup>CARTER, *supra* note 321, at 32-34 (stating that the original goal of affirmative action was to identify minorities in areas of traditional discrimination and provide them an opportunity for advancement and to compete in an equal opportunity environment).

<sup>323</sup>*Id.*

<sup>324</sup>*Id.*

<sup>325</sup>*See, e.g.*, Regents of the Univ. of California v. Bakke, 438 U.S. 265, 387-402 (1978) (separate opinion of Marshall, J.).

<sup>326</sup>Johnson v. Transportation Agency, 480 U.S. 616, 673 (1987) (Scalia, J., dissenting).

<sup>327</sup>*See* BELZ, *supra* note 12, at 148-55, 159-65 (criticizing the analysis of the so-called "reverse discrimination" cases as contrary to any reasonable concept of equal opportunity and equal protection).

discriminatory factors. Under the amendments in the 1991 Act, this will require nullification of all voluntary affirmative action programs.

The other circuit courts and the Supreme Court will not likely find the intent of changes in the 1991 Act as "clear" as did the Ninth Circuit in *Officers for Justice*.<sup>328</sup> Before the Supreme Court grants review on the issue, however, it will have the benefit of thousands of hours of argument and case law from the lower courts outlining all possible permutations of the issues.

#### D. Other Problems

Critics denounced the original Civil Rights Act as a "thought control bill."<sup>329</sup> Congress could not lawfully prohibit the thought or the expression of prejudicial thoughts.<sup>330</sup> An employer can lawfully say "I don't like \_\_\_\_\_ minorities and I don't believe they're capable of honest work." Congress may, however, prohibit discrimination, or "prejudice in action." An employer must recognize the difference and understand its duty to make employment decisions based on the law, not on prejudice.<sup>331</sup> The changes to mixed motive

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<sup>328</sup>*Officers for Justice v. Civil Service Commission*, 979 F.2d 721, 725 (9th Cir. 1992) ("The City properly argues that a more natural reading of the phrase 'in accordance with law' is that affirmative action programs that were in accordance with law prior to passage of the 1991 Act are unaffected by the amendments. The language of the statute is clear, and the City's interpretation is consistent with that language."). The court refused to consider challenges based on § 106 of the Act because they were not raised at the trial level.

In its reply brief, the Union argues that banding is prohibited by section 106 of the 1991 Act, which provides that it is unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." . . . The Union also argues that the Civil Rights Act of 1964 prohibits banding because it unnecessarily trammels the interests of nonminorities. The Union did not raise or discuss either of these issues in its opening brief. . . . [W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief.

*Id.* at 725-26 (citation omitted).

<sup>329</sup>See 100 CONG. REC. S7254 (1964) (remarks of Sen. Ervin); Senator Case defended the bill as controlling conduct, not thoughts: "The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." *Id.* Accord *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring).

<sup>330</sup>See SPECIAL RELEASE, *supra* note 17, at 43.

<sup>331</sup>The same employer could lawfully say, "I don't like \_\_\_\_\_ minorities and I don't think they're capable of honest work, but I will make all employment decisions in compliance with law and regulations despite my personal feelings." Such an open expression of prejudice would create obvious evidentiary problems for this employer in defending his decisions. *Id.* Compare Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992) (finding various aspects of free speech have been abridged as violations of employment discrimination law).

law in the 1991 Act blur the distinction and come very close to crossing the boundary between the two.

Section 107 amends only Title VII's substantive bases for discrimination (race, color, national origin, sex, or religious discrimination). Congress has amended neither the retaliation provision of Title VII<sup>332</sup> nor the Age Discrimination in Employment Act (ADEA);<sup>333</sup> these causes of action will continue to be analyzed, therefore, under the *Price Waterhouse* test. In its Revised Enforcement Guidance, the EEOC states, however, that it has a "unique interest in protecting the integrity of its investigative process" which justifies application of the section 107 analysis in retaliation cases to avoid a "chilling affect upon the willingness of individuals to speak out against employment discrimination."<sup>334</sup> A similar rationale presumably would apply to the ADEA, but such "guidance" lacks a statutory foundation and will not survive any level of judicial scrutiny.<sup>335</sup>

The mixed motive scheme under the 1991 Act also has possible collateral consequences for employers and supervisors. An employer may, for example, discharge an employee for stealing. The employee alleges some discriminatory remarks and manages to convince a jury that race, color, national origin, sex, or religious discrimination was a motivating factor for the discharge. The jury also believes, however, that the plaintiff was indeed guilty of stealing and would have been discharged for that reason alone. This employer would have been relieved of all liability under *Price Waterhouse*, but under the 1991 Act the employer will be liable for injunctive and declaratory relief, fees and costs, and, perhaps more importantly, be branded as a discriminator. Although no action was taken "because of" discrimination, the employer suffers significant monetary loss and damage to his reputation in the community.<sup>336</sup>

A scenario similar to the one above could be even more devastating for a supervisor under federal employment law. Discrimination is a prohibited personnel practice under federal law; appropri-

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<sup>332</sup> 42 U.S.C. § 2000e-3(a) (1992).

<sup>333</sup> 29 U.S.C. §§ 621-634 (1992).

<sup>334</sup> See EEOC Revised Guidance, *supra* note 227, n.14 ("Although Section 107 does not specify retaliation as a basis for finding liability whenever it is a motivating factor for an action, neither does it suggest any basis for deviating from the Commission's long-standing rule that it will find liability . . . whenever retaliation plays any role in an employment decision.").

<sup>335</sup> Among other factors, the EEOC guidance overlooks the individual right of action for federal employees to file suit without EEOC intervention in 42 U.S.C. § 2000e-16 (1992). See Cathcart & Snyderman, *supra* note 25, § IV.A. ("Congress's failure to amend title VII's retaliation provision . . . suggests that retaliation cases should not be decided under the Act's mixed motive analysis.").

<sup>336</sup> Geslewitz, *supra* note 172, at 64.

ate disciplinary action against a supervisor found guilty of discrimination can be severe, including removal.<sup>337</sup> In the mixed motive setting under the 1991 Act, this result would not only be unjust, it would be subject to attack on due process grounds as well.<sup>338</sup>

With the mixed motive changes to the 1991 Act, Congress has skewed the scales in balancing interests between protection of individuals from unlawful discrimination in employment and "maintenance of employer prerogatives."<sup>339</sup> The 1991 Act applies to "any employment practice,"<sup>340</sup> not just hiring, firing, and promotion actions. Plaintiffs now are in a position to leverage employers with threats of discrimination suits for trivial personnel actions, such as periodic appraisals or granting and denying vacation time. Employers will be wary of challenging employees for fear of some bit of evidence—valid or contrived—sufficient to convince a jury that some illegitimate motive existed.

To counterbalance the scales of justice, the courts must read and apply the mixed motive standards restrictively. Plaintiffs must produce direct and substantial evidence that discrimination motivated the challenged action. More than ever, courts must make the difficult decision of whether discriminatory animus existed and be prepared to take the issue from the jury if necessary. Simple disparities in the percentage of minority employees compared to the minorities in the geographic area is a short-sighted, feeble attempt to prove discrimination and should always be rejected.<sup>341</sup>

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<sup>337</sup> Prohibited personnel practice based on discrimination is located in 5 U.S.C. § 2302 (b)(9) (1992). See *Williams v. Department of Defense*, 46 M.S.P.R. 549 (1991), *rev'g* 45 M.S.P.R. 146 (1990). Disciplinary action against a supervisor under 5 U.S.C. § 1215(a)(3) (1992) can include "a removal, a reduction in grade, a debarment (notto exceed five years), a suspension, a reprimand, or an assessment of civil penalty not to exceed \$1000." 5 C.F.R. § 1201.126(c) (1992).

<sup>338</sup> An official who may be stigmatized by a finding of discrimination has a constitutionally protected liberty interest that requires due process commensurate with the potential deprivation. *Arnett v. Kennedy*, 416 U.S. 153, 155 (1974); *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). This generally includes a right to participate in the proceedings—a right not contained in any current discrimination law.

<sup>339</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989). Contra *Sedler*, *supra* note 294, at 1336:

At the present time, therefore, it is once again correct to say that there is a constitutional political consensus on the meaning of employment equality in American Society. . . . Under this constitutional political consensus the meaning of employment equality under federal civil rights policy is that racial minorities and women should have a fair share of the jobs in an employer's workforce—that they should be represented at every level in the workforce in some reasonable proportion to their representation in the overall labor market.

<sup>340</sup> Civil Rights Act of 1991, §107(a) (codified at 42 U.S.C. § 2000e-2(m) (1992)).

<sup>341</sup> For an outstanding application of the "spirit" of Title VII applied against the

## V. Remedies and Jury Trials

*“Write that down,” the King said to the jury, and the jury eagerly wrote down all three dates on their slates, and then added them up, and reduced the answer to shillings and pence.*

Lewis Carroll

Next to the great “quota” dispute,<sup>342</sup> damage awards for intentional discrimination was the most hotly debated issue in the 1991 Act and the failed 1990 Act. Opponents of expanded damage awards presented testimony that similar changes in state discrimination laws had spurred plaintiffs’ attorneys to file suits instead of seeking conciliation and to refuse settlements in “hopes of a large jury verdict, large punitive damage verdict, and a contingent fee coming into their pocket.”<sup>343</sup> A spokesman for the National Foundation for the Study of Equal Employment Policies estimated that the cost of Title VII litigation would skyrocket from 775 million dollars to over two billion dollars per year.<sup>344</sup>

More troubling than the anticipated increase in litigation costs, however, is the doctrinal genesis that compensatory and punitive damages symbolize. In the original Civil Rights Act of 1964, “Congress institutionalized a preference for conciliation” by adopting a complex administrative complaint process oriented toward equitable remedies.<sup>345</sup> “It wanted women and minorities on the job, not lan-

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EEOC’s attempt to prove discrimination by such evidence, see Equal Employment Opportunity Comm’n v. Consolidated Serv. Sys., 47 Daily Lab. Rep. (BNA), D-1 (Mar. 12, 1993) (7th Cir. Mar. 4, 1993):

Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring, adopted because it is the most efficient (not defended because it is efficient—the statute does not reference to efficiency, 42 U.S.C. Section 2000e-2(k)(2)), just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.

(Posner, J.).

<sup>342</sup> See *supra* section III (discussion of disparate impact and the quota issue generally).

<sup>343</sup> 2 *The Civil Rights Act of 1990: Hearings on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 69, 196 (1990) (testimony of David Maddux for the National Retail Federation on the California experience) [hereinafter Senate Hearings].

<sup>344</sup> 3 *The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the House Comm. on Education and Labor*, 101st Cong., 2d Sess. (1990) (testimony of Edward Potter) [hereinafter House hearings].

<sup>345</sup> Laurie M. Stegman, Note: *An Administrative Battle of the Forms: The EEOC’s Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124, 127 (1992).

guishing in the courts."<sup>346</sup> The 1991 Act vaults employment discrimination law from this basic underpinning of conciliation into a litigation-oriented system with tort-like damages. One congressional opponent of the change stated the following:

Currently, there are incentives in place for a quick settlement. This system enables the employee to seek redress and get back to work. But under [the 1991 Act], huge monetary award amounts are encouraged through jury trials, eliminating any incentive for the plaintiff and defendant to settle early. And with legal and expert fees allowed, there is no incentive for the lawyer to settle either. So, what we have here is an invitation to long, drawn out court battles over huge stakes, replacing the current system of solving the problem and getting people back to work.<sup>347</sup>

This doctrinal U-Turn is the first stated purpose—and most significant change to civil rights law—in the 1991 Act: “[T]o provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.”<sup>348</sup>

The shift of focus in employment discrimination law from employer-employee conciliation to tort-based litigation may be “one of the darkest clouds on the horizon for corporate counsel.”<sup>349</sup> The advent of jury trials in Title VII provides an additional disincentive for plaintiffs to settle employment disputes, promises a dramatic increase in employment discrimination litigation, and presents numerous procedural problems for the courts.

### A. Damages

1. *The “Truth.”*—Under pre-1991 Act law, the circuit courts had unanimously held that compensatory and punitive damages were not available under Title VII.<sup>350</sup> Section 102 of the 1991 Act creates a limited right of recovery of compensatory and punitive damages in cases of *intentional* discrimination under Title VII and under the Americans With Disabilities Act (ADA). The 1991 Act does not provide, however, for recovery of either compensatory or punitive damages under the ADEA or under the retaliation provision of Title VII.<sup>351</sup>

<sup>346</sup> Senate Hearings, *supra* note 343, at 208 (testimony of Lawrence Lorber).

<sup>347</sup> 137 CONG. REC. S15,468 (daily ed. Oct. 30, 1991) (statement of Sen. Symms).

<sup>348</sup> Civil Rights Act of 1991, § 3(1).

<sup>349</sup> *See, e.g.*, Geslewitz, *supra* note 172, at 58.

<sup>350</sup> SCHLEI & GROSSMAN, *supra* note 4, § 15.1 at 54 n.3.

<sup>351</sup> Plaintiffs seeking damages under these theories will present arguments similar to those advanced under mixed motive analysis. *See generally supra* section IV.

The portion of section 102 that applies to Title VII damages provides as follows:

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.<sup>352</sup>

This section contains a broad expansion of prior damages, but also has many limitations. There appear to be three thresholds in this section: the first requires a “complaining party,” the second disparate treatment discrimination, and the third a claim not compensable under 42 U.S.C. § 1981.

The 1991 Act manages to confuse what constitutes a “complaining party” by defining it as “the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964.”<sup>353</sup> Because damages are limited to each “complaining party,”<sup>354</sup> the EEOC appears to be limited to a single capped recovery when it brings suits on behalf of multiple plaintiffs.<sup>355</sup> The EEOC General Counsel already has challenged this interpretation,<sup>356</sup> but the success of that position depends on how deeply a court reads into the legislative “intent” of section 102. A textualist reading certainly would limit the EEOC to one recovery.

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<sup>352</sup> Civil Rights Act of 1991, § 102(a) (codified at 42 U.S.C. § 1981a(a)(1) (1992)).

<sup>353</sup> *Id.* § 102(d)(1) (codified at 42 U.S.C. § 1981a(d)(1) (1992)).

<sup>354</sup> *Id.* § 102(b)(3) (codified at 42 U.S.C. § 1981a(b)(3) (1992)).

<sup>355</sup> In 1992, the EEOC filed 354 such suits, down somewhat from the 495 suits filed in 1991. *See* 232 Daily Lab. Rep. (BNA) A-7 (Dec 2., 1992). The 1991 total also was a decrease from the 525 suits filed in 1990. 185 Daily Lab. Rep. (BNA) A-2 (Sept. 23, 1992). The EEOC pending caseload increased during this period from 42,000 in 1990, 46,000 in 1991, to 52,856 at the end of fiscal 1992, despite record productivity of 92.8% cases per investigator during the year. *Id.*

<sup>356</sup> *See* EEOC General Counsel Memorandum, *supra* note 298, at 4 (“When OGC pursues litigation on behalf of more than one person, it shall be OGC’s position that statutory damage limitations apply to each aggrieved individual. Thus, if the Commission brings suit against an employer with more than 500 employees, damages of up to the cap of \$300,000 could be sought for each aggrieved person.”).

(a) *Compensatory Damages for Disparate Treatment.*—

Section 102 clearly prohibits recovery of compensatory and punitive damages in disparate impact actions. This exclusion could affect a plaintiff's litigation strategy because some cases are amenable to analysis under both disparate treatment and disparate impact theories.<sup>357</sup> Jury trials are not available in disparate impact suits. Plaintiffs, therefore, will always attempt to establish a disparate treatment cause of action to try before the jury and to collaterally estop the court from entering findings on the disparate impact claims.<sup>358</sup>

Less clear is the degree of overlap between 42 U.S.C. § 1981 damages and the new section 102 damages (designated as § 1981a). In his interpretive memorandum, Senator Danforth "explained" the purpose behind the prohibition against compensatory and punitive damages whenever recovery is possible under 42 U.S.C. § 1981. This restriction ostensibly was intended to limit double recovery in certain cases rather than require an election of theories. He believed, however, that a plaintiff *could* recover under both section 1981 and the new damages provision if more than one type of discrimination is alleged, such as race and gender.<sup>359</sup>

Senator Danforth's interpretation contradicts the clear language of the statute. Once again, however, the EEOC has adopted his rationale.<sup>360</sup> This explanation seems tenuous because Congress easily could have included language prohibiting double recoveries. The more likely meaning is that the damages provision is available only when no cause of action exists under § 1981. Plaintiffs will sue more often under § 1981 when possible because there are no limits on recovery and fewer procedural hoops to clear than under Title VII. These plaintiffs should not, however, be able to collect double damages for multiple discrimination based on the same acts.<sup>361</sup>

<sup>357</sup> See Five Year Supplement, *supra* note 159, ch. 36, n.134 (listing representative cases).

<sup>358</sup> See *infra* section V.B. (discussion of jury trials).

<sup>359</sup> See 137 CONG. REC. 515,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). See also Cathcart & Snyderman, *supra* note 25, § I.B.

<sup>360</sup> Equal Employment Opportunity Comm'n Directive 915.002, Enforcement Guidance: *Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, § I. (July 14, 1992), 1992 WL 189089, at \*1 [hereinafter EEOC Guidance].

<sup>361</sup> Plaintiffs often file suit under both 42 U.S.C. § 1981 and Title VII based on the same facts. Jury verdicts finding liability under 42 U.S.C. § 1981 normally are conclusive on the issue of liability in an accompanying Title VII action. See, e.g., *King v. Alco Controls Div. of Emerson Elec. Co.*, 746 F.2d 1331, 1332 (8th Cir. 1984); *Whatley v. Skaggs Co.*, 707 F.2d 1129, 1139 (10th Cir.), cert. denied, 464 U.S. 938 (1983). If Senator Danforth's interpretation were adopted by the courts, a plaintiff could win a verdict on a 1981 claim and recover double damages for the same incident of discrimination. See also *infra* section V (discussion of the complexity of jury trials and damages).

Currently, different caps exist under the new § 1981a on the amount of compensatory and punitive damages a plaintiff may recover, based on the size of the employer's workforce. The caps range from \$50,000 for employers with 100 or fewer employees up to \$300,000 for employers with **500** or more employees.<sup>362</sup> The single issue of what constitutes an "employee" under the 1991 Act raises multiple issues, but the courts have prior cases under analogous issues to guide them.<sup>363</sup> Plaintiffs in smaller companies increasingly will attempt to name parent corporations as defendants to maximize their recovery potential.<sup>364</sup>

The 1991 Act raises the issue of exactly what damages are subject to the caps by again providing inadequate definitions. The purpose and nature of compensatory damages are common issues in the law and should create few problems.<sup>365</sup> The controversy surrounding § 1981a is caused by the following ambiguous draftsmanship in the "exclusions" and "limitations" to compensatory damages:

(2) Exclusions from compensatory damages. Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary

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<sup>362</sup>Civil Rights Act of **1991**, § 102(b)(2) (codified at **42 U.S.C. § 1981a(b)(2)(A)** (1992))

In the case of a respondent who has more than **14** and fewer than **101** employees in each of **20** or more calendar weeks in the current or preceding calendar year, **\$50,000**; "(B) in the case of a respondent who has more than **100** and fewer than **201** employees in each of **20** or more calendar weeks in the current or preceding calendar year, **\$100,000**; and (C) in the case of a respondent who has more than **200** and fewer than **501** employees in each of **20** or more calendar weeks in the current or preceding calendar year, **\$ 200,000**; and (D) in the case of a respondent who has more than **500** employees in each of **20** or more calendar weeks in the current or preceding calendar year, **\$300,000**."

<sup>363</sup>See Fitzpatrick, *supra* note 5 at § V.D. ("Plaintiffs' attorneys will seek to maximize the potential number of employees to increase the amount of damages that may be available. . . . To maximize the employer's potential number of employees, plaintiffs' attorneys will increasingly file suit against both subsidiaries and the parent corporations."); see *also* Radio and Television Broadcast Technicians Local Union **1264 v. Broadcast Serv. of Mobile, Inc.**, **380 U.S. 255 (1965)** (finding two different corporations were one for purposes of National Labor Relation Board's jurisdiction).

<sup>364</sup>The courts probably will use tests developed to count employees in prior Title VII litigation, including the "single employer" doctrine. See *generally* **FIVE YEAR SUPPLEMENT**, *supra* note 159, at **385-89**.

<sup>365</sup>See, e.g., *Carey v. Phipus*, **435 U.S. 247, 254 (1978)** (stating purpose of compensatory damages is to "compensate persons for injuries caused by the deprivation of. . . rights").

losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed . . . [damage caps].<sup>366</sup>

Plaintiffs will attempt to exclude damages from these caps by pleading alternate bases for recovery. Employers will argue that all damages fall under this section and are subject to the caps unless compensable under the limited equitable remedies of Title VII.

Recovery of "damages" in Title VII cases previously was based exclusively on section 706(g) of the 1964 Act,<sup>367</sup> which generally is limited to equitable relief.<sup>368</sup> In its Enforcement Guidance, the EEOC has recognized that traditional equitable relief under Title VII includes only injunctive and declaratory relief, backpay, reinstatement, and frontpay; there is no provision for recovery of past pecuniary damages.<sup>369</sup> The EEOC has, nonetheless, concluded that past pecuniary losses are somehow included in the new "compensatory damages" but not subject to the damages cap. Reasoning by negative inference, it has concluded that section 102 limits future pecuniary losses but not past pecuniary losses; therefore, past pecuniary losses may be recovered without limitation.<sup>370</sup>

The EEOC interpretation impugns the clear language of the law, which does not provide at all for recovery of past pecuniary losses. Section 102(a) allows recovery of "compensatory and punitive damages as allowed in section(b)."<sup>371</sup> Section 102(b) limits compensatory damages but includes no "savings" clause or other provision that would allow recovery of past pecuniary damages.<sup>372</sup> Under the general tenet that damages may not be recovered against the United States absent an explicit waiver of sovereign immunity,<sup>373</sup> past pecuniary losses may not be recovered under this section.

<sup>366</sup> Civil Rights Act of 1991, § 102(b) (codified at 42 U.S.C. § 1981a(b) (1992)). Note that this section amends 42 U.S.C. 1981 and *not* Title VII.

<sup>367</sup> 42 U.S.C. § 2000e-5(g) (1991).

<sup>368</sup> See, e.g., *Mitchell v. Seaboard Sys. R.R.*, 883 F.2d 451, 452 (6th Cir. 1989) (limiting Title VII plaintiffs to equitable relief; compensatory damages not available).

<sup>369</sup> EEOC Guidance, *supra*, note 360, at n.5.

<sup>370</sup> *Id.* § I.A.

<sup>371</sup> Civil Rights Act of 1991, § 102(a) (codified at 42 U.S.C. § 1981a(a) (1992)).

<sup>372</sup> Fitzpatrick, *supra* note 5, § V.

<sup>373</sup> See, e.g., *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (holding that when Congress attaches conditions on waiver of sovereign immunity, "those conditions must be strictly construed"); *United States v. Sherwood*, 312 U.S. 584, 596 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court defines that court's jurisdiction to entertain that suit."); *United States v. Mitchell*, 445 U.S. 535 (1980) (finding a congressional waiver of sovereign immunity must be unequivocally expressed and will be strictly construed).

(b) *ADA "Good faith" Defense.*—The 1991 Act's limitations on ADA cases shadow the mixed motive exclusion for intentional discrimination under Title VII. A plaintiff cannot recover compensatory and punitive damages if the employer demonstrates that it made good faith efforts to reasonably accommodate the complainant's disability. Section 102 states as follows:

(2) Disability. In an action brought by a complaining party under . . . the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . , the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation . . . damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.<sup>374</sup>

Several potential tripwires exist in this language that will challenge the courts interpreting them.

The "good faith" defense is limited specifically to damages "under this section," meaning compensatory and punitive damages. An employer who fails to reasonably accommodate, but satisfies the good faith test, still will be guilty of discrimination and liable for reinstatement, backpay, attorney's fees, costs, and other appropriate relief.<sup>375</sup> An employer who successfully demonstrates a reasonable accommodation ostensibly will avoid liability entirely. Unfortunately, reasonable accommodation is a fact-intensive, case-by-case conclusion requiring full litigation of the issues.<sup>376</sup>

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<sup>374</sup> Civil Rights Act of 1991, § 102(a)(2)&(3) (codified at 42 U.S.C. § 1981a(a)(2)&(3) (1992)).

<sup>375</sup> EEOC Guidance, *supra* note 360, at \*1-2.

<sup>376</sup> See FIVE YEAR SUPPLEMENT, *supra* note 159, at 85-87. There likely will be a great deal of litigation under the ADA. The EEOC has found that only about 10.9% of

Another issue in the handicap restrictions is the appropriate evidentiary and procedural process to establish "good faith efforts." As in mixed motive cases, plaintiffs can request jury trials when seeking compensatory or punitive damages.<sup>377</sup> Courts must determine how to juggle the trial proceeding to reach the threshold issue of "good faith" before charging the jury with damage instructions.<sup>378</sup>

A more obscure issue may be raised by the language "in consultation with the person with the disability who has informed the covered entity that accommodation is needed." There appear to be two separate steps to the test: (1) the employee informs the employer that reasonable accommodation is needed; and (2) the employer consults with the disabled employee in a good faith effort to find a reasonable accommodation. This section raises at least two issues for the courts: how an employer shows good faith with an uncooperative employee,<sup>379</sup> and whether an employee can strip the employer of the potential defense altogether by simply failing to inform the employer that an accommodation is needed. The courts will likely rely on abundant case law in defining reasonable accom-

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ADA complaints are resolved, informally compared to about 75% of all other discrimination complaints. *See* 58 Daily Lab. Rep. (BNA) A-7 (Mar. 29, 1993) (over 5500 charges have already been filed under the ADA and the rate of filings is increasing).

<sup>377</sup> Civil Rights Act of 1991, § 102(c) (codified at 42 U.S.C. § 1981a(c) (1992)). *See supra* text accompanying notes 369-87 (discussion of the evidentiary questions raised in mixed motive cases); *see also infra* text accompanying notes 416-34 (discussion of jury trials in general).

<sup>378</sup> *See infra* text accompanying notes 422-33 (discussion of Seventh Amendment issues).

<sup>379</sup> On the issue of good faith in Rehabilitation Act cases, *see, e.g.*, *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437 (6th Cir. 1991):

The question is thus not whether TVA's decision that plaintiff was not employable due to his psychiatric condition was correct measured by "objective" standards. What is relevant is that TVA, in fact, acted on its good faith belief about plaintiff's condition based on Dr. Paine's opinion, and, as the district court pointed out, there is no proof to the contrary.

*See also* *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("[T]he reasons tendered need not be well-advised, but merely truthful."); *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir. 1983) ("The trier of fact is to determine the defendant's intent, not adjudicate the merits of the facts or suspicions upon which it is predicated."); *Jones v. Orleans Parish Sch. Bd.*, 679 F.2d 32, 38 (5th Cir.), *modified on other grounds*, 688 F.2d 342 (5th Cir. 1982), *cert. denied*, 461 U.S. 951 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge."); *Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) ("[W]hether HCCAA was wrong in its determination that Jeffries acted in violation of HCCAA guidelines . . . is irrelevant. . . . [W]here an employer wrongly believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief."); *Fahie v. Thornburgh*, 746 F. Supp. 310, 315 (S.D.N.Y. 1990) ("[T]he Bureau's honestly held, although erroneous, conviction that [plaintiff] was not a good employee is a legitimate ground for dismissal.").

modation and good faith, but there is a paucity of guidance on the employee's duty to disclose a disability.<sup>380</sup>

(c) Punitive Damages.—Section 1981a allows recovery of punitive damages under Title VII, ADA, and the Rehabilitation Act, as follows:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.<sup>381</sup>

This section clearly exempts federal, state, and local agencies from liability for punitive damages. Nothing in the extensive legislative history or elsewhere explains why Congress chose to define the common term of "punitive damages" while omitting far more essential definitions. Even more puzzling is why Congress chose this particular definition instead of the universally accepted definition from *Smith v. Wade*.<sup>382</sup> In his "unofficial" remarks on the 1991 Act, Representative Edwards did attempt to clarify the definition of punitive damages in the 1991 Act by stating that they would be available "to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed."<sup>383</sup>

Most of the circuit courts have adopted the *Smith v. Wade* definition for punitive damages under 42 U.S.C. § 1981 and will likely apply the same test under new section 1981a.<sup>384</sup> The courts

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<sup>380</sup>The courts may impute knowledge to the employer, although there is little case law on imputed knowledge in this area. *See, e.g.*, *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989) ("There is a dearth of authority on the propriety of imputing knowledge from an employee-supervisor to the employer in this type of action. Consequently, we must turn to traditional agency-employer-employee principles to determine whether ARCO should be charged with knowledge of Kimbro's condition in this case.").

<sup>381</sup>Civil Rights Act of 1991, § 102(b)(1) (codified at 42 U.S.C. § 1981a(b)(1) (1992)).

<sup>382</sup>461 U.S. 30, 47-48 (1983) ("Punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others.") (citing RESTATEMENT (SECOND) TORTS § 908 (1979)).

<sup>383</sup>237 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). This statement is not binding on the courts and fails to explain why a definition of punitive damages was needed at all. It was, perhaps, one of the few definitions agreed to in compromise negotiations.

<sup>384</sup>*See, e.g.*, *Rowlett v. Anheuser-Bush, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987); *Stephens v. South Atl. Cannery, Inc.*, 848 F.2d 484, 489 (4th Cir. 1987), cert. denied, 488 U.S. 996 (1988); *Beauford v. Sisters of Mercy, Providence of Detroit, Inc.*, 816 F.2d

also may adopt the Supreme Court's recent analysis for punitive damages in *Molzof v. United States*.<sup>385</sup> *Molzof* applied a common law meaning to punitive damages because the statute involved did not specifically define the term. The 1991 Act does define punitive damages, which will require the Court to decide whether the 1991 Act definition is different from the common law meaning.<sup>386</sup>

**2. The Consequences.**—The 1991 Act's expansive remedies will spawn litigation in two ways. First, plaintiffs and employers will seek to define the parameters of the new law and challenge the numerous controversial and ambiguous provisions that are contrary to their respective positions. Second, and more significantly, suits alleging sexual, religious, and disability discrimination will increase dramatically with the prospect, for the first time, of recovering compensatory and punitive damages with a right to jury trial.<sup>387</sup> Now the path to equal employment does run through the courthouse door!<sup>388</sup>

Opponents of the 1991 Act feared that jury trials with damage awards would burden the system and present an open invitation to

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1104, 1108–09 (6th Cir. 1987), *cert. denied*, 484 U.S. 913 (1987); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987); *Block v. R.H. Macy & Co.*, 712 F.2d 1241 (8th Cir. 1982); *Woodsv. Graphic Communications*, 925 F.2d 1195, 1206 (9th Cir. 1991); *Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986). The EEOC also has adopted this test and listed factors to determine malice or reckless indifference. *See* EEOC Guidance, *supra* note 360, at \*8–10.

<sup>385</sup> 112 S. Ct. 711 (1992) (“[P]unitive damages” [are] commonly understood to be damages awarded to punish defendants for torts committed with fraud, actual malice, violence, or oppression.”).

<sup>386</sup> *Id.* at 715.

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

(Thomas, J.) (citations omitted).

<sup>387</sup> *See* Cathcart & Snyderman, *supra* note 25 § II.B; *see also* Geslewitz, *supra* note 172, at 60:

The problem for employers, however, is that the new Act opens up the possibility of compensatory and punitive damages and jury trials in every Title VII case involving intentional discrimination allegations. This holds out the possibility of very large damages awards in practically any case, turning fairly routine discharge cases into the functional equivalent of personal injury lawsuits.

<sup>388</sup> *Adams Clymer, Battle Over Civil Rights Emphasizes Sexual Bias*, N.Y. TIMES, March 4, 1991, at A14 (“The path to equal employment does not run through the courthouse door.”) (quoting Zachary Fasman); *see also* Cathcart & Snyderman, *supra* note 25, § II.B. (“It would be surprising, indeed, if the promise of significant financial compensation did not escalate the resolution of employment discrimination claims through litigation”).

litigation,<sup>389</sup> and those fears are now being realized. In the first quarter of fiscal year 1993, 1608 sexual harassment complaints were filed with the EEOC—more than two-and-a-half times as many as were filed in the first quarter of 1991.<sup>390</sup> The EEOC received a record 19,160 charges during the three months from October 1 to December 1, 1992.<sup>391</sup> Age, race, and gender complaints increased in fiscal year 1992 more than eleven percent from the 1991 rate of 60,000 charges.<sup>392</sup> The new ADA—which went into effect for employers with twenty-five or more employees on July 26, 1992—alone generated 2401 complaints in the quarter.<sup>393</sup> The EEOC will not fully realize the prolonged case load brought about by this law and the changes to Title VII for some time.

Even with compensatory and punitive damages available for sexual, religious, and disability discrimination, some civil rights advocates are not satisfied with the damage caps imposed on these suits.<sup>394</sup> There are no limits to recovery on actions based on race or ethnicity under 42 U.S.C. § 1981.<sup>395</sup> Members of Congress who are sympathetic to the damages anomaly have already proposed lifting the damage caps for all cases.<sup>396</sup>

The current caps on damages are also an open invitation to constitutional challenge. Plaintiffs consistently have alleged a deprivation of their constitutionally guaranteed right to equal protection in challenging legislative caps on tort damages.<sup>397</sup> Most courts have

<sup>389</sup> See, e.g., *House Civil Rights Law Should be Law*, USA TODAY, June 5, 1991, at 12A (according to President Bush, "The Democratic bill invites people to litigate, not cooperate. This is no way to promote harmony.").

<sup>390</sup> 48 Daily Lab. Rep. (BNA) A-4 (Mar. 15, 1993). Sexual harassment complaints also were up some 69% in fiscal year 1992. These charges also were disproportionately concentrated in the last few months of the year: the EEOC "didn't begin to see an appreciable increase until after the mini-series back in the fall with the Supreme Court." 15 Daily Lab. Rep. (BNA) A-4 (Jan. 26, 1993) (referring to the Clarence Thomas Supreme Court confirmation hearings) (citing statistics from EEOC General Counsel Donald R. Livingston).

<sup>391</sup> 48 Daily Lab. Rep. (BNA) A-4 (Mar. 15, 1993).

<sup>392</sup> 15 Daily Lab. Rep. (BNA) A-4 (Jan. 26, 1993).

<sup>393</sup> 48 Daily Lab. Rep. (BNA) A-4 (Mar. 15, 1993).

<sup>394</sup> See Geslewitz, *supra* note 172, at 60 ("Womens' rights groups and many in Congress, however, are unhappy with this compromise and promise to push for elimination of the caps in future legislative sessions.").

<sup>395</sup> See SPECIAL RELEASE, *supra* note 17, at 79 (actions under § 1981 also provide other procedural advantages over Title VII suits).

<sup>396</sup> H.R. 224, 103d Cong., 1st Sess. (1993) ("Equal Remedies Act of 1993"); S. 17, 103d Cong., 1st Sess. (1993) ("Equal Remedies Act of 1993"). Similar proposals in the last Congress never came to a floor vote. H.R. 3975, S. 2062, 102d Cong., 2d Sess. (1992).

<sup>397</sup> See generally Mary Ann Willis, *Limitation on Recovery of Damages; Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. Cm. L. REV. 1329-51 (1986).

rejected such challenges under a rational basis analysis;<sup>398</sup> however, some courts have applied a heightened scrutiny review to damage caps.<sup>399</sup>

Section 1981a includes an additional factor that may heighten judicial scrutiny: the court cannot advise the jury of the limitations on damages.<sup>400</sup> Plaintiff-employees of smaller employers will argue that they should not be limited in their recovery because of the size of the employer's business. Large employers will argue, conversely, that they should not be liable for more damages in each incident of discrimination simply because they employ more workers.<sup>401</sup> All will argue some Seventh Amendment deprivation because of the prohibition on jury advisements.

The courts easily may become confused by the diversity and complexity of Title VII issues under "one" law. Unless the Supreme Court determines that the 1991 Act applies retroactively, courts will continue to try Title VII cases under pre-Act law for many years to come.<sup>402</sup> New cases will arise under the damage caps in that same period, some of which will involve claims based on both pre- and post-Act conduct. The same court could hear contemporaneously yet a third type of Title VII claim should Congress lift the current damage caps. Individual suits will be difficult enough; any court confronted with a class action suit under Title VII will want "Supreme" guidance.<sup>403</sup>

In *United States v. Burke*,<sup>404</sup> the Supreme Court held that Title

<sup>398</sup> See, e.g., *Davis v. Omitowaju*, 883 F.2d 1155, 1158 (3d Cir. 1989); *Boyd v. Bulala*, 871 F.2d 1191, 1196-97 (4th Cir. 1989).

<sup>399</sup> See, e.g., *Richard v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153, 1163 (N.M. 1988); *Sibley v. Board of Supervisors of Louisiana State Univ.*, 477 So. 2d 1094, 1107-09 (La. 1985); *Condemarin v. University Hosp.*, 775 P.2d 348, 353-56 (Utah 1989).

<sup>400</sup> Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(c)(1) and § 1981a(d)(1)(B) (1992)).

<sup>401</sup> Cathcart & Snyderman, *supra* note 25, § II.C.

<sup>402</sup> The "burden" on the courts to distinguish between the laws applied does not, however, justify modifying the expectations and rights of the parties by retroactive application of the 1991 Act. *Contra* Estrin, *supra* note 40, at 2078 (concluding that the "Civil Rights Act of 1991 reaffirms the principles embodied in Title VII, and only retroactive application of the Act can fulfill the Court's obligation to effectuate legislative intent by eradicating discrimination from the American workplace.").

<sup>403</sup> Currently, class actions under Title VII normally are certified under Fed. R. Civ. P. 23(b)(2) (1992), which is inappropriate when plaintiffs seek primarily money damages. See, e.g., *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 422 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976). The more appropriate basis for class certification under the 1991 Act may be Rule 23(b)(3), requiring common questions of law or fact. The court would have to determine, however, that a class action is the most efficient form of litigation. Especially in cases involving different sizes of employers under the damage caps, this will be a difficult conclusion to reach.

<sup>404</sup> 112 S. Ct. 1867 (1992).

VII awards may not be excluded from personal income under the tax code as “damages received . . . on account of personal injuries.”<sup>405</sup> The Court found only recoveries based on “tort-like personal injuries” could be excluded from income.<sup>406</sup> The prior Title VII remedial structure focused “on ‘legal injuries of an economic character,’”<sup>407</sup> but failed to address “traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, and other consequential damages.”<sup>408</sup> The Court added the caveat to its holding that “discrimination could constitute a personal injury . . . if the relevant cause of action evidenced a tort-like conception of injury and remedy.”<sup>409</sup>

In *Burke*, the Court distinguished Title VII remedies from other discrimination laws that provide for compensatory and punitive damages and jury trials.<sup>410</sup> The courts will likely use this language to hold that damages under the new § 1981a are excludable from income under the tax code. Less clear is whether the traditional Title VII damages under section 706(g) will continue to be subject to *Burke*. Because the provision for compensatory and punitive damages actually amends § 1981 instead of Title VII, the Internal Revenue Service and the courts will argue persuasively that they do.<sup>411</sup> This “novel” bit of draftsmanship in the 1991 Act creates a fertile environment for judicial lawmaking in both the areas of damages and jury trials.

Although it has no authority under section 42 U.S.C. § 1981, the EEOC has interpreted § 1981a as authorizing compensatory and punitive damages during the administrative phases of Title VII processing of federal employees’ complaints.<sup>412</sup> Federal agencies will likely compound the litigation workload by rejecting such awards

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<sup>405</sup> 26 U.S.C. § 104(a)(2) (1991).

<sup>406</sup> *Burke*, 112 S. Ct. at 1873.

<sup>407</sup> *Id.* (quoting *Albemarle Paper Co.*, 422 U.S. 405, 418 (1978)).

<sup>408</sup> 112 S. Ct. at 1873.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 1873-74.

<sup>411</sup> The Act amends 42 U.S.C. § 1981 (1988) with the following language: “The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section: ‘SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.’” Civil Rights Act of 1991, § 102. This peculiar amendment is the source of further confusion pertaining to jury trials. See *infra* text accompanying notes 422-34 (additional discussion).

<sup>412</sup> See 242 Daily Lab. Rep. (BNA) A-4 (Dec. 16, 1992); *Jackson v. U.S. Postal Svc.* Appeal No. 01923399 (Nov. 12, 1992); *Guyton v. Dept. of Veterans’ Affairs*, Appeal No. 01931099 (Dec. 7, 1993). The EEOC bases its “authority” to award compensatory damages in the administrative process on policy. Since § 1981 does not authorize payment of compensatory damages during an administrative complaint, however, an agency that does so may violate fiscal law by improperly expending appropriated funds.

and taking their chances in court;<sup>413</sup> however, many cases will never complete EEOC processing. A sharp rise in complaints and a slashed budget will stretch the EEOC's administrative processing time from the 1992 average of eleven months to over three years.<sup>414</sup> With the prospect of a jury trial and compensatory damages as the alternative, plaintiffs will be disinclined to wait more than the minimum 180 days to file suit<sup>415</sup> or to accept any settlement less than the moon.<sup>416</sup>

### *B. Jury Trials*

The differences between traditional Title VII equitable remedies and § 1981a damages create a new vacuum in employment discrimination law—how does the jury function in Title VII suits? Congress could have provided the courts with guidance by amending Title VII with language on jury trials similar to that contained in Title VIII of the Civil Rights Act of 1968,<sup>417</sup> or even § 1981 itself.<sup>418</sup> Instead, Congress created a hybrid by limiting jury trials to certain cases and certain issues, which again requires statutory interpretation as the courts attempt to find the “right” application. Supportable conclusions cover a wide range of options, from limiting the jury to determining only compensatory and punitive damages after the court has found liability, to certifying all issues of liability and damages to the jury.

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<sup>413</sup> EEOC awards are not binding on federal agencies, unlike in the private sector. Federal agencies can accept the EEOC decision and preclude suit by the employee, or reject the EEOC decision and provide the employee an opportunity for de novo review in federal district court. *See* 29 C.F.R. § 1614.109 (1992) (“Within 60 days of receipt of the findings and conclusions [of the EEOC administrative judge], the agency may reject or modify the findings and conclusions or accept the relief ordered by the administrative judge.”). Administrative awards of damages are paid from agency funds, but damages awarded by courts are paid from a judgment fund. *See* 28 U.S.C. § 2414 (1992). In times of slashed federal budgets, federal agencies may often choose to gamble with someone else's budget.

<sup>414</sup> 184 Daily Lab. Rep. (BNA) A-7 (Sept. 22, 1992) (reporting that EEOC Chairman Evan Kemp Jr. stated the 1992 EEOC budget of \$222 million would bring the Commission to the “brink of disaster. If we were a business, we'd be out of business,” he warned, and the commission would be forced into “a Chapter 11-type reorganization, jeopardizing the very product we deliver.” Personnel costs account for 76% of the EEOC budget. Commission officials said the pending caseload of about 43,000 claims would escalate to more than 100,000 in the next two years, and complaints, which currently take about 11 months to resolve, would take three years). The current budget-cutting frenzy in the federal government does not bode well for future prospects of speedy EEOC claim processing.

<sup>415</sup> 42 U.S.C. § 2000e-5(f)(1) (1992) (“[I]f within one hundred and eighty days of the filing of such charge . . . the Commission has not filed a civil action under this section, . . . a civil action may be brought.”)

<sup>416</sup> *But see infra* note 442 (limitation of costs).

<sup>417</sup> 42 U.S.C. § 3613(c) (language).

<sup>418</sup> 42 U.S.C. § 1981 (language).

Under § 1981a, any party can request a “trial by jury” when a complaining party seeks compensatory or punitive damages.<sup>419</sup> Title VII plaintiffs were not previously entitled to a jury trial for determination of liability or “equitable” damages, such as backpay on reinstatement,<sup>420</sup> and nothing in the 1991 Act changes this portion of the law.<sup>421</sup> The courts now must separate responsibilities—that is, define what matters the “trial by jury” will try—and there are numerous possibilities.

One textualist interpretation of § 1981a would maintain *all* liability issues in Title VII suits within the province of the court; juries would decide only compensatory and punitive damages after the court has found liability. This interpretation is consistent with the statutory language and would allow for greater procedural efficiency of Title VII suits. The 1991 Act allows for the new damages “in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964.”<sup>422</sup> This language implies that the new damages provision does not alter the existing equitable damages under Title VII, which are determined by the court. The 1991 Act also limits jury trials to those seeking “compensatory or punitive damages under this section,”<sup>423</sup> “against a respondent who *engaged in* unlawful intentional discrimination.”<sup>424</sup> There can be no “engaged in” until there is a proper finding of liability against an employer. The court must therefore hear the evidence and find unlawful intentional discrimination before a jury can determine appropriate compensatory or punitive damages.

Maintaining issues of liability within the purview of the court solves numerous procedural problems potentially raised by the 1991 Act. Courts would avoid the struggle of apportioning responsibility for findings of liability and damages under § 1981a and section 706(g). They also could determine whether the mixed motive rules apply before jury selection became necessary.<sup>425</sup> In cases susceptible

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<sup>419</sup>Civil Rights Act of 1991, § 102(c) (codified at 42 U.S.C. § 1981a(c) (1992)).

<sup>420</sup>See *United States v. Burke*, 112 S. Ct. 1867, 1881 (1992) (citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969)); see also SPECIAL RELEASE, *supra* note 17, at 63 (“The importance of the exclusion of § 706(g) remedies from the provisions of § 1981a must not be overlooked. This exclusion means that the rules and procedures that have governed Title VII backpay awards are not directly affected by § 1981a. For example, the Title VII backpay award remains a form of equitable relief that is in the purview of the court, not the jury.”).

<sup>421</sup>As one commentator noted, “the rules and procedures that have governed Title VII backpay awards are not directly affected by § 1981a.” SPECIAL RELEASE, *supra* note 17, at 63.

<sup>422</sup>Civil Rights Act of 1991, § 102(a)(1) (codified at 42 U.S.C. § 1981a(a)(1)(1992)).

<sup>423</sup>*Id.* § 102(c) (codified at 42 U.S.C. § 1981a(c) (1992)).

<sup>424</sup>*Id.* § 102(a)(1) (codified at 42 U.S.C. § 1981a(a)(1) (1992)) (emphasis added).

<sup>425</sup>See *supra* section III (discussion of mixed motive issues generally).

of analysis under either disparate impact or disparate treatment theories, the court could find liability under the appropriate theory and certify damage issues to the jury only for its intentional discrimination findings; potential Seventh Amendment objections over split juries in class action suits would be eliminated.<sup>426</sup>

Although alluring, the "jury for damages only" concept certainly will draw constitutional attacks from plaintiffs. Simultaneous trial to the court and to a jury is fairly common in suits alleging violations of both Title VII and § 1981.<sup>427</sup> Common factual issues are first tried to the jury so that the litigant's Seventh Amendment jury trial rights are not foreclosed. The court is then bound by the jury's determination of factual issues common to both causes of action.<sup>428</sup> Most courts have found the "allocation of the factfinding function between the jury and the court" complicated in cases tried under both § 1981 and Title VII.<sup>429</sup> The difficulty factor will increase exponentially with § 1981a added.

The Supreme Court addressed the roles of the court and jury in discrimination suits in *Lytle v. Household Manufacturing, Inc.*<sup>430</sup> The district court had improperly dismissed the plaintiff's § 1981

<sup>426</sup> See *infra* text accompanying notes 432-33 (discussion of jury trials in class action suits).

<sup>427</sup> See, e.g., *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988) ("Bifurcation is necessary because of the different remedies available under each statute. . . . Under Title VII . . . remedies are equitable in nature . . . under § 1981, however, . . . remedies have been characterized as legal in nature.") (citations omitted) (holding jury determination in § 1981 action binds the court in Title VII findings).

<sup>428</sup> *Id.* at 1442. See generally Friedman, *supra* note 54 (discussing litigation related to Title VII). Several courts have found that jury determinations of discrimination in Equal Pay Act claims binds the court in accompanying Title VII claims. See, e.g., *Korte v. Diemer*, 909 F.2d 954 (6th Cir. 1990); *Cattlett v. Missouri Hefewig*, 828 F.2d 1260 (8th Cir. 1987); *Kitchen v. Chippewa Valley Sch.*, 825 F.2d 1004 (6th Cir. 1987); *Ward v. Texas Employment Comm'n*, 823 F.2d 907 (5th Cir. 1987); *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir. 1983).

<sup>429</sup> *Skinner*, 859 F.2d at 1439. Unfortunately, "they ain't seen nothin' yet!"

<sup>430</sup> 494 U.S. 545 (1990). The Court held as follows:

The Seventh Amendment preserves the right to trial by jury in "Suits at common law." . . . When legal and equitable claims are joined in the same act, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact" . . . "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims" . . . . The Court in *Beacon Theaters* emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it "thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel."

*Id.* (citations omitted). *Accord* *Farber v. Massillon Bd. of Educ.* 917 F.2d 1391 (6th Cir. 1990) (holding that a court determination of facts under Title VII cannot preclude right to jury trial under Section 1983 claim). The difficulty with applying these cases

action in *Lytle* and entered summary judgment on the Title VII claims. The circuit court affirmed, but a unanimous Supreme Court found that the plaintiff's Seventh Amendment right to a jury trial had been impinged and reversed.<sup>431</sup> Although the decision rambles, its message clearly requires legal issues to be tried to a jury before the court decides equitable issues.

Some courts have applied the *Lytle* procedure, found the jury determination unsupported by the evidence, and entered judgment notwithstanding the verdict. The appellate courts regularly have reinstated the jury verdicts on appeal in these cases.<sup>432</sup> Courts that apply the *Lytle* rule will encounter additional Seventh Amendment issues in class action suits. Because either party can request a jury trial, employers will argue that they have a Seventh Amendment right to have the same jury determine liability and damages. Large class actions involving dozens—or even hundreds—of plaintiffs would make this impracticable. Should the court successfully bifurcate the proceedings and get beyond this challenge, it still would be forced to try numerous damage claims for individual plaintiffs.<sup>433</sup>

The intent of § 1981a sharpens in focus when considered in light of the complexity of suits tried under the “new” Title VII. The allowance of compensatory and punitive damages, “provided that the complaining party cannot recover under section . . . 1981,”<sup>434</sup> is a practical limitation on civil rights actions. Contrary to other interpretations, this section must force an election of remedies at the trial level. Congress has left this door open for the courts to enter their own interpretations. To prevent unjust double damages, and to save themselves countless headaches and reversals, these courts should interpret the law consistently with judicial economy and fairness by forcing an election.

### *C. Attorney and Expert Fees*

To complete the shift of Title VII orientation from conciliation to litigation, the 1991 Act allows prevailing plaintiffs to recover

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to the 1991 Act is that they involved two separate laws and distinct causes of action; procedures applying to jury trials under § 102 of the Act involve only Title VII remedies, albeit both equitable and legal remedies.

<sup>431</sup> *Lytle*, 494 U.S. at 556.

<sup>432</sup> See, e.g., *Arenson v. Southern Univ. Law Ctr.*, 911 F.2d 1124 (5th Cir. 1990) (jury verdict in 1983 claim reinstated over court's judgment notwithstanding (N.O.V.) the verdict); *Van Houdnor v. Evans*, 807 F.2d 648, 657 (7th Cir. 1986) (jury verdict in 1983 claim reinstated over court's judgment N.O.V.); see also *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d. Cir. 1990) (affirming judgment N.O.V. on 1983 claim against city but reversing on claims against individuals).

<sup>433</sup> *Cathcart & Snyderman*, *supra* note 25, § II.C.

<sup>434</sup> Civil Rights Act of 1991, § 102(a)(1) (codified at 42 U.S.C. § 1981a(a)(1) (1992)).

"expert fees" as part of an award of attorney fees. Section 113 amends section 706(k) of the Civil Rights Act of 1964<sup>435</sup> "by inserting '(including expert fees)' after 'attorney's fee.'"<sup>436</sup> This section also allows recovery of expert fees as part of attorney's fees under 42 U.S.C. § 1981.<sup>437</sup> This seemingly simple change fails to allow these fees for other bases of discrimination, which may cause even more litigation than the change itself.

The amendment for expert fees overrules *West Virginia University Hospitals, Inc., v. Casey*,<sup>438</sup> where the Supreme Court rejected payment of both testimonial and nontestimonial expert witness fees under the Civil Rights Attorneys' Fee Awards Act. The 1991 Act goes beyond what the plaintiffs sought in *Casey* by authorizing "expert fees," which include fees of experts who provide services during the administrative phase of an action and preparation for litigation.<sup>439</sup>

By an obvious oversight in drafting, section 113 does not allow payment of expert fees under either § 1983 or the ADEA. A more subtle oversight in drafting may preclude recovery of expert fees in mixed motive cases and Title VII retaliation suits. This error is again caused by amendment of 42 U.S.C. § 1981 for damages instead of amending Title VII. Section 107 of the 1991 Act limits recovery of attorney fees and costs in mixed motive cases "demonstrated to be directly attributable only to the pursuit of a claim under section 703(m)." <sup>440</sup> Section 703(m) is specifically limited to actions based on race, color, religion, sex, or national origin. Because mixed motive plaintiffs may not recover damages under the new section 1981a, they may not recover expert fees as part of their "attorney fees and costs."<sup>441</sup> A similar analysis bars recovery of expert fees for plaintiffs prevailing only under a theory of retaliation under Title VII.

<sup>435</sup> 42 U.S.C. § 2000e-5(k) (1992).

<sup>436</sup> Civil Rights Act of 1991, § 113(b) (codified at 42 U.S.C. § 2000e-f(k) (1992)).

<sup>437</sup> "The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting, '1977A' after '1977'." Civil Rights Act of 1991, § 103, 42 U.S.C. § 1988 (1992). "In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee." Civil Rights Act of 1991, § 113(c) (codified at 42 U.S.C. § 1988(c) (1992)).

<sup>438</sup> 111 S. Ct. 1138 (1991).

<sup>439</sup> See *id.* (for a discussion of the distinction); see also Shannon, *supra* note 146, at 18 ("Therefore, prevailing parties may be reimbursed for the fees of experts who consulted during trial preparation.").

<sup>440</sup> Civil Rights Act of 1991, § 107(b)(3)(B) (codified at 42 U.S.C. § 2000e-5(g)(3)(B) (1992)).

<sup>441</sup> Section 102 limits recovery of compensatory and punitive damages to those in "an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991 (codified at 42 U.S.C. § 1981a(2) (1992)).

These plaintiffs are not authorized compensatory or punitive damages under § 1981a. Because expert fees are tied to attorney fees recovered under the new § 1981a, plaintiffs proving only retaliation may not recover.

One commentator stated the sentiments of many when he wrote, "This provision may lead to 'over-trying' cases, but courts are likely to use rule 16 pre-trial conferences to keep . . . [expert fees] from becoming a blank check." To discourage this "blank check" mentality, courts must use their discretionary authority to limit awards of fees and costs to plaintiffs who incur exorbitant costs or refuse reasonable settlement.<sup>442</sup>

## VI. Conclusion

*"That's the penalty we have to pay for our acts of foolishness—someone else always suffers for them."*

Alfred Sutro

A contemplative study of the Civil Rights Act of 1991 leaves a reader questioning the purpose and direction of civil rights law in the 1990s. The changes in the 1991 Act contribute nothing to increase the likelihood of achieving true equal employment opportunity in our society. In this law, there is no strategy to eradicate the vestiges of black slavery or sexism, no plan to speed the understanding and homogenization of cultural diversities, and no deterrent to class consciousness. Congress has provided treatment only for some symptoms of discrimination instead of attacking the causes. The 1991 Act is a law of stratification that encourages racism, sexism, and litigation to further *individual* goals and not society's. It does not encourage equal opportunity, it encourages fractionalization and litigation. "When will the people in Washington wake up and recognize that what is needed to better race relations in America are good jobs, good economic opportunities and a good workplace."<sup>443</sup>

By encouraging litigation, the 1991 Act places employers and employees at odds with one another. This diametrical opposition to the original far-sighted Civil Rights Act of 1964 leaves civil rights law

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<sup>442</sup> See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412, 425 (7th Cir. 1989) (denying attorney fees to prevailing plaintiff who extended litigation by refusing a settlement "with no hope of greater recovery."). @. **FED.** R. Civ. P. 68 (1992) (requiring a plaintiff who does not recover more than an offered settlement to "pay the costs incurred after the making of the offer.").

<sup>443</sup> 137 CONG. REC. 515,467 (daily ed. Oct. 30, 1991) (statement

in the United States confused, complicated, and without direction. Congress further perpetuates this state in the 1991 Act by delegating lawmaking authority to the courts on the difficult, key issues. The courts will be deluged with employment discrimination suits raising issues of first impression. The result will be delays in judgments, reversals, and overall dissatisfaction by everyone involved.

Virtually everyone involved in employment discrimination cases, from the employees and employers, through the EEOC, up to the appellate courts and Supreme Court, will “pay the price for Congress’ foolishness” in passing the 1991 Act. Only when Congress begins to pass civil rights laws that have specific goals and provide guidance to the parties and the courts will some measure of equal employment opportunity be possible. Until then, litigation rules and dissatisfaction reigns.

# FIXING THE WAR POWERS

MAJOR MICHAEL P. KELLY\*

## I. Introduction

Shortly after the Vietnam War ended, Congress passed the War Powers Resolution (WPR),<sup>1</sup> a unique and enduring legacy of Vietnam and the besieged President who ended that war. An express purpose of the WPR is to ensure the “collective judgment”<sup>2</sup> of both the executive and legislative branches with respect to the use of force. The WPR was an apparent attempt to settle this constitutionally enigmatic area and to forge a new war powers partnership.

The WPR’s numerous defects are still the object of lengthy, largely unproductive, legal debates. From an experiential standpoint, eighteen years have documented the WPR’s failures. The *modus operandi* of presidents persists—unilaterally deciding to use force and then executing the operation—while Congress debates and resigns itself to a *fait accompli*. The constitutional imbalance deepens with each successive use of force. And instead of forging a partnership, the WPR has prevented a healing of the divisiveness between the two political branches.

The proper way to fix America’s war powers is to repeal the WPR immediately and to return to the conceptual model for the war powers developed by the framers of the Constitution—but only to the extent that historic practice has ratified this conceptual model. The framers consciously constructed an extremely general model for the war powers based on their historically limited perspective. They anticipated that practice would provide the specifics. The framers expected a joint, cooperative exercise of the war powers—not exercise by one branch. The framers knew that they could not have the most efficient government possible, so they instead created the best possible government that had a realistic chance of being ratified.

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<sup>1</sup>The War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1982 & Supp. IV 1986) [hereinafter WPR].

<sup>2</sup>*Id.* § 1541(a).

They worked under tremendous time pressure,<sup>3</sup> and never expected their work to stand without amendment. They fully intended to create an adaptable government that could function in the context of an ever-changing world.<sup>4</sup>

The world has experienced dramatic, fundamental changes especially in the last few years, and change likely will continue. The United States probably will attempt to maintain its leadership within this "new world order."<sup>5</sup> Before the United States pursues this crucial role, however, it must carefully consider the vitality of its own procedures for developing and executing national security policy and foreign policy, which is a broader, yet totally interrelated, area.<sup>6</sup> An honest examination reveals that deficiencies exist, especially with respect to the war powers. In a complex world of constant change and ambiguous threats, the political branches must be partners in a well-defined, cooperative, and workable war powers arrangement.<sup>7</sup>

## 11. The War Powers Resolution: Was "Collective Judgment" Effectively Restored?

### A. *The War Powers Resolution in a Historical Context*

By the early 1970s, Congress's discontent with presidential usurpation of the war powers was several decades old. After the close of America's last declared war, World War II, the pattern of nearly total congressional deference to executive initiative began to dissolve. For years this discontent was largely individual rather than institutional, exemplified by the failed attempts to pass war powers legislation and to check other executive powers over national security.<sup>8</sup> In November 1973, Congress passed the WPR over President

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<sup>3</sup> The federal convention met in Philadelphia, Pennsylvania, from May 25, 1787 through September 17, 1787. Bedamin F. Wright, *Introduction* to ALEXANDER HAMILTON ET AL., *THE FEDERALIST* 1 (Benjamin F. Wright ed., 1961).

<sup>4</sup> See *infra* notes 95-97 and accompanying text.

<sup>5</sup> George H. W. Bush, *Preface* to *THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES*, at v (1991).

<sup>6</sup> See *infra* notes 325-31 and accompanying text.

<sup>7</sup> See *infra* notes 367-70 and accompanying text.

<sup>8</sup> See debates on S. Res. 99, 82d Cong., 1st Sess., 97 CONG. REC. 2539, 2571, 2589, 2644, 2652, 2736, 2739, 2769, 2845, 2851, 2862, 2871, 2903, 2910, 2938, 2966, 3008, 3041, 3056, 3062, 3076, 3144, 3161, 3254 (1951); see also H.R.J. Res. 9, 82d Cong., 1st Sess., 97 CONG. REC. 34 (1951); S. REP. NO. 129, 91st Cong., 1st Sess. (1969); 115 CONG. REC. 17,245 (1969) (National Commitments Resolution). During the Korean conflict, Congress also attempted to assert more authority over foreign agreement-making processes. See S.J. Res. 130, 82d Cong., 2d Sess. (1952); S.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 73, 83d Cong., 1st Sess. (1953); S. REP. NO. 412, 83d Cong., 1st Sess. (1953) (Bricker Amendment).

Nixon's strongly worded veto.<sup>9</sup> At the time of passage, this appeared to be a bold reassertion of Congress's constitutional war powers. In retrospect, it is obvious that the WPR was the result of reactionary politics rather than constitutional principle.

As an institution, Congress rarely commits strongly to any specific position, and passage of a law over an executive veto is rare. The WPR passed at a singular moment in American history. American involvement in the unpleasant and unsuccessful Vietnam War was just ending, and the President was under siege. These unique historical forces gave Congress enough resolve to overcome its normal institutional inertia regarding the war powers.

1. *Nixon's War*—Political realities played a role in Congress's attitude toward the Vietnam War and subsequently in the passage of war powers legislation. By late 1968, most Americans had renounced the Vietnam War.<sup>10</sup> Much of modern politics is driven by public opinion. Consequently, many of our legislators began trying to distance themselves from the increasingly unpopular conflict. The election of a Republican President in November 1968 made the task easier for the majority in Congress; the Democrats no longer had to choose between party loyalty and the public's increasingly clear mandate to terminate the conflict.<sup>11</sup>

The public's short-term memory helped these congressmen in their quest to transfer blame to the President. In 1964, Congress had passed the Gulf of Tonkin Resolution with only two dissenters in the Senate and none in the House. This resolution gave the President nearly total discretion to initiate war.<sup>12</sup> Congressmen later dis-

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<sup>9</sup>The WPR does not stand alone. During the mid-1970s, Congress passed several laws that procedurally affected the executive's rather free management of foreign policy. For example, the Senate established a standing committee to oversee Central Intelligence Agency operations, the International Security Assistance and Arms Export Control Act passed in 1976 affected military sales, and 1 U.S.C. § 112(b) (Supp. V 1975) affected the making of executive agreements. See Thomas M. Franck, *After The Fall: The New Procedural Framework For Congressional Control Over The War Power*, 71 AM. J. INT'L L. 605, 606 (1977).

<sup>10</sup>According to the Gallup polls, public support for the conflict in Vietnam began a consistent and precipitous fall in early 1967, from approximately 52% in March 1967 to below 30% in May 1971 (last poll). See MARK LORELL & CHARLES KELLEY, JR., RAND CORPORATION, CASUALTIES, PUBLIC OPINION, AND PRESIDENTIAL POLICY DURING THE VIETNAM WAR 17-28 (1985); see also ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 25-31 (1991); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 276 (Norton Library 1975) (1972); John C. Cruden, *96 War-Making Process*, 69 MIL. L. REV. 35, 58-66 (1975).

<sup>11</sup>President Richard M. Nixon became our 37th President on January 20, 1969. Growing antiwar sentiments probably helped President Lyndon B. Johnson decide not to seek re-election in 1968. His own party rapidly was becoming antiwar, anti-Johnson. See ANTHONY AUSTIN, THE PRESIDENT'S WAR 321-23 (1971); TURNER, *supra* note 10, at 27-28.

<sup>12</sup>Cruden, *supra* note 10, at 59-60.

claimed their earlier role in leading the nation into battle. They claimed that the Tonkin Resolution was not a "declaration of war" and that it had not been intended to give such discretion to the President.<sup>13</sup> By 1973, they pointed to a power-usurping President as the prime offender. With a relatively clear conscience, congressmen—especially new arrivals—could demand passage of war powers legislation to prevent future instances of unilateral presidential war-making.<sup>14</sup>

After taking office in 1969, President Nixon committed a series of political blunders with respect to Vietnam. The mistakes seemed to stem from an overconfidence in his ability to impose his will on an increasingly hostile public and Congress. In April 1970, when the public wanted and expected de-escalation of the war, American forces invaded neutral Cambodia. This unexpected expansion of military operations exacerbated the tense domestic situation.<sup>15</sup> In February 1971, the President agreed to provide combat support activities for South Vietnam's unsuccessful invasion of Laos. This violated, or came very close to violating, prior congressional appropriation limitations.<sup>16</sup> And finally, President Nixon's contemptuous treatment of the Mansfield Amendment—the Senate's first attempt to end the war—helped to solidify congressional antiwar sentiments.<sup>17</sup>

By the summer of 1971, publication of *The Pentagon Papers*<sup>18</sup> had begun. This work revealed how several administrations had withheld vital information about Vietnam from the public and from congressional decision-makers.<sup>19</sup> President Nixon's defiant, almost arrogant, handling of the Vietnam conflict in the face of known public dissent and waning congressional support sealed his fate. He

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<sup>13</sup>TURNER, *supra* note 10, at 28-29.

<sup>14</sup>CRUDEN, *supra* note 10, at 71; TURNER, *supra* note 10, at 33-35.

<sup>15</sup>CRUDEN, *supra* note 10, at 60-61.

<sup>16</sup>*Id.* at 58-59, 59 n.112, 62.

<sup>17</sup>*Id.* at 63. The Mansfield Amendment was a rider to a 1971 military procurement bill. The rider urged the president "to terminate at the earliest practicable date all military operations of the United States in Indochina." When President Nixon signed the bill he declared his intent to ignore the rider because it did not correspond with his judgment concerning the conflict's termination.

<sup>18</sup>*Id.* at 62 (stating that publication began on 13 June 1971). *See generally* THE PENTAGON PAPERS (N. Sheehan ed., 1971).

<sup>19</sup>*Id.* at 62-63 n.125. *See generally* ANATOMY OF AN UNDECLARED WAR: CONGRESSIONAL CONFERENCE ON THE PENTAGON PAPERS (Patricia A. Krause ed., 1972) (attacking dishonesty of several presidential administrations for hiding true facts of Vietnam from Congress; concluding that executive branch cannot be trusted to provide sufficient information to Congress for it to fulfill its constitutional role in war-making; and recommending that Congress develop dedicated and independent information sources).

became the necessary political "scapegoat." It was all too simple for Congress to convert the Vietnam War into "Nixon's war."<sup>20</sup>

**2. The Besieged Presidency: 1973.**—From the heights of an overwhelming re-election victory in November 1972, startling revelations concerning Nixon's abuse of power and privilege led to a precipitous fall in public support throughout 1973.<sup>21</sup> The Watergate scandal began the presidential fall. Watergate was continuously in the news and therefore before the public. President Nixon's early denial of any involvement, and his attempts to suppress relevant information<sup>22</sup> and hamper the ever-widening investigation, undermined his credibility. The "Saturday Night Massacre" evinced his willingness to abuse presidential powers.<sup>23</sup> In July and August 1973, the Senate Armed Services Committee heard testimony about the falsification of records to conceal secret bombings of Cambodia in 1969 and early 1970.<sup>24</sup> President Nixon's alleged improprieties concerning personal finances also were in the news. On July 12, 1973, the House government operations subcommittee began investigating the use of federal funds on the President's private residences in Florida and California. Tax experts questioned the propriety of his tax returns for 1970 and 1971.<sup>25</sup> Properly or not, President Nixon was under tremendous personal and political siege when the WPR passed over his veto. He had abused presidential powers and tried to hide behind presidential privileges. The Nixon Administration became the epitome of an "Imperial Presidency."<sup>26</sup>

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<sup>20</sup>TURNER, *supra* note 10, at 29.

<sup>21</sup>For a catalogue of problems which beset President Nixon in 1973, *see* generally Carol L. Thompson, *Nixon, Richard Milhous*, in *THE WORLD BOOK YEAR BOOK 1974: EVENTS OF 1973*, at 422-23 (William Wille, et al., eds., 1974); William J. Eaton, *Watergate*, in *THE WORLD BOOK YEAR BOOK 1974: EVENTS OF 1973*, at 530-34 (William Wille, et al., eds., 1974).

<sup>22</sup>The arrogance of President Nixon is typified by his attempts to keep investigatory information from Mr. Leon Jaworski, the Watergate Special Prosecutor. Nixon's position was that the evidence was protected by "executive privilege." Eventually, the United States Supreme Court ordered release of the evidence by an 8-0 vote. *See United States v. Nixon*, 418 U.S. 683 (1974). Considering the political and personal damage that this evidence brought about, the President's desperate position was as understandable as it was damaging to the presidency.

<sup>23</sup>*See* Cruden, *supra* note 10, at 74-75. *See* also THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER* 213-25 (1974) (describing dramatic political effect that "Saturday Night Massacre" had on ultimate passage of WPR).

<sup>24</sup>Thompson, *supra* note 21, at 451.

<sup>25</sup>*Id.* at 423.

<sup>26</sup>Arthur Schlesinger, Jr., coined this phrase in his authoritative work about the historic accumulation of power in the office of the President, culminating in the abuses of power by President Richard Nixon. *See* ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* viii (1973). The most telling evidence of President Nixon's complete loss of control and prestige came shortly after passage of the WPR on November 7, 1973. On December 20, 1973, the House Judiciary Committee appointed Mr. John M. Doar to prepare evidence of impeachable offenses against the President. Impeach-

**3. Passage of the War Powers Resolution.**—Without the convergence of these extraordinary events, Congress probably would have failed to pass the WPR. Proposals for war power legislation had been discussed as early as 1970.<sup>27</sup> Both houses drafted bills, but fundamental differences in approach made them virtually irreconcilable. The appointed conference committee failed to resolve the differences and these proposals died.<sup>28</sup> However, by 1973 an increasingly unpopular President rapidly was becoming the focal point of blame for an unpopular war. The unfolding saga of Nixon's "Imperial Presidency" legitimized Congress's claim that the President had usurped the war powers. The WPR was touted as a law to prevent future Vietnam Wars and to end presidential abuse.<sup>29</sup> No one wanted any more Vietnams; and no one wanted any more imperial presidents. For a brief moment in history, passage of the WPR became politically easy to rectify constitutional imbalances and, perhaps more importantly, to placate constituents. Moreover, the expendable Nixon would be forever tied to Vietnam, and congressional distancing would be complete. The 93d Congress seized the opportunity and, as will be discussed, passed an ill-advised compromise version of the war power bills.<sup>30</sup>

A truly unique historical setting gave life to the WPR. An unpopular foreign war and a maverick President were the engines

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ment of a president is such a rare event in United States history that the only previous impeachment was against President Andrew Johnson over the politics of radical reconstruction. It appears that only President Nixon's resignation prevented the second senatorial impeachment proceeding in our history. It is also likely that President Ford's blanket pardon of Nixon in September 1974 saved him from being convicted of several criminal offenses.

<sup>27</sup>H.R.J. Res. 1355, 91st Cong., 2d Sess. (1970). The resolution was primarily procedural and provided for prior consultation and subsequent reporting. The House overwhelmingly passed this resolution by a vote of 288 to 39. See H.R. REP. No. 287, 92d Cong., 2d Sess. 2346 (1972). The Senate failed to act, and the measure died in the 91st Congress.

<sup>28</sup>Cruden, *supra* note 10, at 70–71. In summary, there were two radically different approaches due to differing philosophies: the House approach was to allow presidential use of force unless Congress subsequently dissented; the Senate's version was more restrictive and attempted to foreclose presidential use of force without congressional authorization. *War Power Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 20 (1973) (testimony of Senator Jacob Javits, cosponsor of the Senate bill).

<sup>29</sup>Because Congress fully participated with the executive branch in initiating the Vietnam War, the theory that the WPR would prevent future Vietnams has been largely discredited. See generally P. EDWARD HALEY, CONGRESS AND THE FALL OF SOUTH VIETNAM AND CAMBODIA (1982) (stating the cautious conclusion that Congress was a war power partner to Vietnam War).

<sup>30</sup>Compromise and passage of the hybrid WPR was not without high level dissent. Senator Eagleton, a cosponsor of the original Senate version, stated, "This is no historic moment of circumscribing the President of the United States insofar as war making is concerned. This is an historic tragedy." EAGLETON, *supra* note 23, at 219.

needed to generate sufficient political momentum and incentive in Congress, an institution normally indifferent to the war powers. Reactionary politics rarely produce good law. The WPR is a classic example of this.<sup>31</sup>

### *B. A Critical Evaluation of the War Powers Resolution*

The WPR has been law for almost twenty years. Numerous scholars have argued over the various constitutional and drafting deficiencies. No President ever has formally invoked the WPR absent a degree of congressional coercion, and most administrations barely have acknowledged the WPR's existence.<sup>32</sup> Procedurally, the WPR never has operated as Congress intended. In the wake of nearly every major military operation, Congress has debated its constitutional role in the war powers arena. Amendments are proposed periodically, and disposed of without action. Except for a few indirect benefits that are difficult to quantify, the overwhelming weight of opinion is that the WPR has failed from both a legal and experiential standpoint.

1. *Evaluation from a Legal Standpoint.* — Professor Edward S. Corwin has stated that, within the war powers arena, and more broadly within all of foreign relations, the two political branches are constitutionally left with “an invitation to struggle.”<sup>33</sup> If this is true, the WPR is ideally drafted to perpetuate this antagonistic contest. From a modern constitutional law perspective, Professor Corwin undoubtedly is correct. However, the goal should be to facilitate cooperation, not struggle. The WPR does not create an effective, constitutionally based, cooperative partnership, and this is ultimately why the WPR does not work.

(a) *The War Powers Resolution's Adversative Nature.* — The WPR represents a congressional attempt to forcefully reinsert itself into the process by which the war powers are exercised. No attempt to accommodate is made—the WPR is simply prescriptive in nature. By passing the WPR, Congress necessarily presumed that it could constitutionally legislate the substantive policies and pro-

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<sup>31</sup> According to Professor Robert Turner, the WPR is simply one of nearly 150 reactionary statutes that Congress passed during the mid-1970s. Many of them targeted perceived executive usurpations of power. Professor Turner believes that most have proven ill-advised and ineffective. See ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* xvi (1983).

<sup>32</sup> President Carter's administration apparently accepted the WPR, although his position was “never fully voiced or tested.” See Senator Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L.J. 367, 392–93 n.98 (1988) (stating the authors' views that the Carter administration, to a limited extent, accepted the WPR).

<sup>33</sup> EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 171 (4th rev. ed. 1957).

cedures governing America's war powers.<sup>34</sup> Therefore, the WPR purports to bind the President.

The WPR essentially mandates "collective" participation by requiring interactions at critical junctures in the process. For example, the WPR creates a process whereby the President "shall consult" with Congress before introducing forces into hostilities or imminent hostilities,<sup>35</sup> "shall consult regularly" thereafter until the forces are safe,<sup>36</sup> "shall submit . . . a report" to Congress "within 48 hours" of introducing forces that includes certain information,<sup>37</sup> "shall . . . report" certain information periodically throughout the deployment,<sup>38</sup> and "shall provide" other congressionally requested information.<sup>39</sup> Construed as a whole, and considering its prescriptive nature, the WPR's tenor is undeniably adversative. In a sense, the WPR establishes procedures for the executive and legislative branches to deal with each other at arms length.

The WPR effectively blocks development of a more cooperative process. This is the natural result of its prescriptive nature and adversative tone. Though presidents rarely acknowledge its existence, the WPR causes, if anything, presidents to be less cooperative with Congress for fear that any cooperation could be read as acquiescence to Congress's war powers. Because prior practices form the basis for most of the President's war power,<sup>40</sup> chief executives carefully avoid any adverse practice which could bind future administrations. Under the WPR, presidents methodically avoid formal compliance with the WPR by exploiting its arguably unconstitutional and

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<sup>34</sup> See *infra* notes 298-303 and accompanying text (a more thorough discussion about the concept of fluctuating powers). In the war powers arena, the extent of the congressional authority to constitutionally legislate a solution is not absolutely clear. To Professor William Van Alstyne, the answer is clear based on Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952)—Congress affirmatively exercised its power through the WPR, and the President is bound to act consistent with the law. See William Van Alstyne, *The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIA. L. REV. 17, 36-37 (1988).

<sup>35</sup> 50 U.S.C. § 1542 (1982 & Supp. IV 1986). The problems with this consultation requirement are reviewed *infra* notes 53-55 and accompanying text. Arguably, this requirement is not adversative because it is illusory. The text qualifies the mandatory consultation language with an ambiguous and undefined phrase "in every possible instance." Nor is the legislative history helpful in interpreting what this phrase means. See H.R. CONF. REP. No. 547, 93d Cong., 1st Sess. 2364 (1973) (recognizing that prior consultation will be impossible in certain instances and that the President needs more flexibility; as compared to the House's version, which envisioned prior consultation in almost every case, but with a smaller group of congressional leaders].

<sup>36</sup> 50 U.S.C. § 1542 (1982 & Supp. IV 1986).

<sup>37</sup> *Id.* § 1543(a).

<sup>38</sup> *Id.* § 1543(c).

<sup>39</sup> *Id.* § 1543(b).

<sup>40</sup> See *infra* notes 234-79 and accompanying text.

inartfully drafted provisions. Even more dangerous is executive branch recourse to “covert” operations or use of surrogate entities as instruments of force, as typified in the Iran-Contra affair.<sup>41</sup> The Vietnam experience should have taught America about the dangers of having an executive branch that unilaterally and “covertly” develops and executes its own national security policies. In this respect, because the WPR did not forge a partnership between the coordinate political branches, it tempts the executive to take secretive, unilateral actions. Mutual distrust and secrecy are not conducive to cooperation and true partnership.

(b) *Critical Operative Provisions That Are Arguably Unconstitutional.*—The questionable constitutionality of most law is not as problematic as it is with regard to the WPR. Its adversative nature exacerbates the slightest issue of constitutionality. Presidents repeatedly have resolved all doubt in favor of noncompliance.<sup>42</sup> Moreover, the courts repeatedly have declined to exercise judicial review<sup>43</sup> in the war powers arena. Thus, the constitutionality of the WPR is of particular importance to its effectiveness.

No court has pronounced the WPR—or any provision within the WPR—unconstitutional, except in one notable instance.<sup>44</sup> Scholars continue to debate the constitutionality of WPR provisions, and arguments on both sides of the issue generally contain merit. Congress understood that portions of the WPR were arguably unconstitutional. Inclusion of section 9,<sup>45</sup> the “Separability Clause,” reflects congressional intent to save as much as possible, if a court found constitutional defects.

(i) *Section 2 Purpose and Policy.*—Whatever may have been the original intent behind section 2 was lost in the process of compromise between the houses’ fundamental differences in approach to the WPR. The Senate’s version consistently had tried to circumscribe the independent authority of the President to intro-

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<sup>41</sup>See generally J. Graham Noyes, *Cutting the President Off From Tin Cup Diplomacy*, 24 U.C. DAVIS L. REV. 841 (1991); Alex Whiting, *Controlling ‘Pin Cup Diplomacy*, 99 YALE L.J. 2043 (1990).

<sup>42</sup>During congressional debates leading to passage of the WPR, problems with the doubtful constitutionality of several provisions were handled by stating that Congress would rely on the good faith of the President to comply with and construe provisions consistent with the law’s overall spirit. See 118 CONG. REC. H11,026 (1972); 119 CONG. REC. H33,859 (1973).

<sup>43</sup>Edward S. Convin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 552 (1914) (discussing controversial judicial review function first pronounced by Chief Justice John Marshall). See *infra* notes 354–62 and accompanying text.

<sup>44</sup>*Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

<sup>45</sup>50 U.S.C. § 1548 (1982& Supp. IV 1986).

duce American forces into combat or imminent combat.<sup>46</sup> Much of the Senate's language survived the process of compromise, and section 2 therefore appears to define and to set limits on the President's war powers.<sup>47</sup> To the extent that it does so, it is arguably unconstitutional.<sup>48</sup>

Section 2 is probably not an operative, binding provision. Section 2(c) omits certain well-established powers of the Commander-in-Chief.<sup>49</sup> Even Senator Jacob Javits (cosponsor of the Senate's version), who asserted that section 2(c) remained an operative provision in 1973, acknowledged during a panel discussion in 1984 that the subsection was constitutionally flawed.<sup>50</sup> These obvious omissions undercut this provision's constitutional credibility. Moreover, section 8(d) states that "[n]othing in this joint resolution—(1) is intended to alter the constitutional authority of the Congress or of the President . . . ." This statement further obscures the purpose behind section 2(c).<sup>51</sup> Apparently in recognition of these problems, the conference committee consciously placed the provision in the "policy and purpose" section of the compromised bill. Pursuant to the principles of statutory construction, these sections contain precatory, not substantively operative provisions.<sup>52</sup>

(ii) *Sections 3 and 4(c): Consultation and Continuous Reporting.*—In addition to serious drafting ambiguities, section 3,

<sup>46</sup>Cruden, *supra* note 10, at 68–70, 77.

<sup>47</sup>The plain language of section 2 suggests circumscription of presidential power. Section 2(a) sets forth the general proposition that "collective judgement" is to precede the introduction of American forces into hostilities or imminent hostilities. Section 2(b) provides a constitutional theory for Congress's authority to pass laws to facilitate execution of all constitutional powers, whether assigned to Congress or the President. Section 2(c) appears to narrowly define the President's independent powers as Commander-in-Chief. 50 U.S.C. § 1541 (1982 & Supp. IV 1986).

<sup>48</sup>H.R. CONF. REP. No. 547, *supra* note 35, at 2364. *See generally* TURNER, *supra* note 10, at 109–10; Cruden, *supra* note 10, at 80 n.198 (Representative Clement Zablocki emphasized that compromise version reflected House's position that any attempt to define presidential authority would be "constitutionally questionable").

<sup>49</sup>Cruden, *supra* note 10, at 78–79; Biden & Ritch, *supra* note 32, at 386; John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1392–95 (1988); TURNER, *supra* note 10, at 109–10.

<sup>50</sup>TURNER, *supra* note 10, at 109–10.

<sup>51</sup>At least one administration, President Carter's, has cited the language in § 1547(d)(1) for the proposition that the WPR did not alter the substantial, independent war powers of the Commander-in-Chief. This occurred within the context of the failed Iran hostage rescue, which President Carter directed based solely on his authority as Commander-in-Chief. Jack B. Patrick, *Ten Years After the War Powers Resolution: On the Road Through Lebanon, Grenada, and Central America With a Constitutional Turn* at Chadha 12–13 (April 1984) (unpublished manuscript, on file with the University of Virginia Law Library).

<sup>52</sup>Cruden, *supra* note 10, at 80; Thomas M. Franck, *Rethinking War Powers: By Law Or By "Thaumaturgic Invocation"?*, 83 AM. J. INT'L L. 766, 772 (1989).

which requires prior and continuous consultation,<sup>53</sup> is partially unconstitutional. To the extent that the President introduces forces into hostilities or imminent hostilities pursuant to his own independent powers as the Commander-in-Chief, consultation and reporting are beyond congressional authority to mandate.<sup>54</sup> The same can be said for section 4(c),<sup>55</sup> which requires the President periodically to report specific information to Congress. A wise President will consult and report to Congress, but these acts are likely to be on his or her terms. So far, all presidents have considered these provisions arguably unconstitutional and have refused to strictly comply with them.

(iii) *Section 4(b): Delivery of Information to Congress.*—Given the firmly entrenched doctrine of “executive privilege,”<sup>56</sup> the provision requiring delivery of certain information to Congress also is arguably unconstitutional. Executive privilege is particularly strong in the context of national security.<sup>57</sup> Congress is simply at the mercy of executive discretion concerning the information received under this provision in the WPR. Moreover, courts are unlikely to resolve any contest over this military information.

(iv) *Sections 5(b) and 5(c): The Terminators.*—The provisions for terminating military operations are more clearly unconstitutional than the previously discussed provisions. Section 5 of the WPR establishes two methods by which Congress can force the President to terminate American involvement: (1) failure to affirmatively

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<sup>53</sup> 50 U.S.C. § 1542 (1982 & Supp. IV 1986).

<sup>54</sup> TURNER, *supra* note 10, at 110–11 (discussing President Reagan’s denial of constitutional requirement to consult Congress prior to invasion of Grenada); *id.* at 109 (discussing President Carter’s belief that no prior consultation was required regarding Commander-in-Chief’s power to rescue American’s from Iran); see also ANN VAN WYNN THOMAS & A.J. THOMAS, *THE WAR-MAKING POWERS OF THE PRESIDENT* 145 (1982).

<sup>55</sup> 50 U.S.C. § 1543(c) (1982 & Supp. IV 1986).

<sup>56</sup> See generally CORWIN, *supra* note 33, at 428 n.41 (providing further references and discussing many of the primary exchanges in this historical debate over executive privilege); ADAM CARLYLE BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE: PRESIDENTIAL CONTROL OVER INFORMATION* (1974); RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); STUDY PREPARED BY THE GOVERNMENT AND GENERAL RESEARCH DIVISION OF THE LIBRARY OF CONGRESS, *THE PRESENT LIMITS OF “EXECUTIVE PRIVILEGE”* (1973), reprinted in *id.* at 373–86; TURNER, *supra* note 10, at 76–80. The two previous background sources both cite the House of Representatives’ request for papers regarding Major General St. Clair’s failed military expedition as the very first contest over executive privilege within a national security context. The respective authors come to opposite conclusions as to the precedent set by the same incident.

<sup>57</sup> TURNER, *supra* note 10, at 102 n.110; *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (expressly does not reach issue of executive privilege within national security context).

authorize the use of forces within sixty<sup>58</sup> days;<sup>59</sup> or (2) passage of a concurrent resolution at any time.<sup>60</sup> Under the first method, a law purporting to require automatic termination of a military operation at an arbitrary point in the future, without requiring Congress to act affirmatively, is almost certainly unconstitutional. Professor Michael Glennon noted that section 5 was at the heart of the WPR methodology, because it had the effect of saving Congress from institutional inertia.<sup>61</sup> The automatic nature of the first termination provision is undoubtedly the very feature that renders the provision unconstitutional. Section 5(b) derogates the express constitutional power of the President to control ongoing military operations. Concerning the second method, the United States Supreme Court addressed a similar issue in *Immigration and Naturalization Service v. Chadha*.<sup>62</sup> The Court held that legislative veto provisions, similar to the WPR's concurrent resolution provision,<sup>63</sup> were unconstitutional.

Because all of the critical operative provisions of the WPR are arguably unconstitutional, it is fair to inquire as to whether the law has any legal effect at all. If experience under the WPR is any indication of legal efficacy, the only possible conclusion is that the WPR is "dead letter."

## 2. Evaluation from an *Experiential* Standpoint.

(a) *Abysmal* Record.—Experience has proven the WPR ineffective in two important respects. First, the WPR is a failure

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<sup>58</sup>The President unilaterally can extend this sixty-day period for an additional thirty days if he properly "certifies" to Congress the "unavoidable military necessity" of such an extension. 50 U.S.C. § 1544(b) (1982 & Supp. IV 1986).

<sup>59</sup>*Id.* § 1544(b).

<sup>60</sup>*Id.* § 1544(c).

<sup>61</sup>Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 577 (1984).

<sup>62</sup>*Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

<sup>63</sup>The holding and rationale in *Chadha*, as applied to the WPR, may not necessarily defeat use of the WPR's concurrent resolution mechanism. In *Chadha*, the basis for holding a "legislative veto" unconstitutional was that it circumvented the presentment clause. But within the context of the war powers, a legislative veto arguably is constitutional based on a symmetry analysis. If Congress can initiate war with a declaration passed by simple majorities in the both houses (which arguably need not be presented and cannot be vetoed, see HENKIN, *supra* note 10, at 32-33, 295 n.5), why should termination of war require presentment and a super-majority vote from each house? See Glennon, *supra* note 61, at 577-78; John N. Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139 (1988). See also Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1432-36 (within context of the WPR, where Congress is not attempting to retain a "legislative veto" over delegated power, *Chadha* does not necessarily make section 5(c) unconstitutional); Ely, *supra* note 49, at 1395-96 (*Chadha* is distinguishable since WPR is an entire "package attempting in concrete terms to approximate the accommodation reached by the Constitution's framers"); Cyrus Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 86-87 (1984).

when evaluated in terms of the amount of "collective judgement" it restored. This consultive aspect was key to the WPR, because Congress perceived that presidents habitually presented a *fait accompli* for its approval. Experience has shown that "consultation," whatever the term was supposed to mean,<sup>64</sup> often occurs *after* the use of force or initiation of the military operation. When consultation occurs prior to the use of force, it consistently has taken the form of mere notification of the executive's course of action.<sup>65</sup> The WPR has not restored meaningful collective judgment.

Second, the WPR's methodology has never worked properly. The WPR incorporated a "self-activating mechanism"<sup>66</sup> to be triggered by the President's "48 hour report" required in section 4(a).<sup>67</sup> The wording was ambiguous; no President has ever voluntarily triggered the mechanism by reporting properly. Most presidential reports state that they are "consistent with" the WPR, but cite no specific provision.<sup>68</sup>

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<sup>64</sup>Due to serious drafting ambiguities, presidents easily have circumvented the requirement to involve Congress in the decision-making process. From the beginning, the intended nature and extent of the "consultation" requirement has been pondered. See Cruden, *supra* note 10, at 81-84. Who is to be consulted? If the conference committee's conscious modification is any indication of intent, then the President is to consult the entirety of "the Congress" as opposed to key leaders. *Id.* at 82. What does consultation mean? Presidents typically have exploited the ambiguities of this term and have satisfied the requirement however they wished. At the War Power Hearings, few agreed on what consultation meant. *Id.* at 83-84, 84 nn.211-12. Congressmen's responses after the Mayaguez rescue in 1975 confirm that the term "consultation" was not well understood. See Thomas E. Ekhuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of United States Claims*, 82 MIL. L. REV. 41, 61-62 n.78 (1978). To complicate matters, the WPR indicates that the President can forego prior consultation if it is not a "possible instance." 50 U.S.C. § 1542 (1982 & Supp. IV 1986). Who determines this and by what standard?

<sup>65</sup>Ely, *supra* note 49, at 1383, 1400 n.63 (cataloging a host of references dealing with "consultation" during specific incidents).

<sup>66</sup>See generally Glennon, *supra* note 61, at 571-75 (discussing how "self-activating mechanism" was intended to work; Professor Glennon is a former legal counsel to the Senate Foreign Relations Committee and worked extensively with WPR issues). Congress apparently envisioned that after initial "consultation," the President would submit a report within 48 hours in compliance with section 4(a)(1)—at least in the case of actual or imminent hostilities. This report would trigger the expedited consideration in Congress and possibly the termination provision of section 5(b). No administration has ever made this full cycle with a Congress. Only once was this procedure belatedly triggered—when Congress negotiated a "compromise" with President Reagan concerning our Marines in Lebanon. Shortly after recognizing the WPR's applicability and apparently getting what he wanted, President Reagan repudiated his recognition. See Ely, *supra* note 49, at 1381 & n.9 (reflecting that the compromise was little more than congressional acquiescence).

<sup>67</sup>50 U.S.C. § 1543(a) (1982 & Supp. IV 1986).

<sup>68</sup>Biden & Ritch, *supra* note 32, at 390 (stating that only one report has ever specifically mentioned section 4(a)(1) of the WPR—the report by President Gerald Ford concerning the Mayaguez incident that was submitted after the event). See also Ekhuniak, *supra* note 64, at 46-82 (detailing a chronology of events in the Mayaguez rescue); *id.* at 167-70 (reflecting President Ford's report to Congress, which stated

Any compliance, even partial compliance, normally has been in response to congressional pressure. Unfortunately, Congress as a whole seldom rallies itself to the task of enforcement.<sup>69</sup> Contrary to some congressmen's claims, Operations Desert Shield and Storm are the most recent examples of the WPR's failure to meaningfully involve Congress in war-making.<sup>70</sup> It is difficult to build a record of success when circumvention proves to be so easy.<sup>71</sup> Considering its adversative nature, presidents exploit every possible drafting ambiguity in avoiding the WPR and its intended methodology.

*(b) A Few "Successes"?*—A few scholars have found salutary aspects in the WPR, but most of these favorable comments are from early writers.<sup>72</sup> Some scholars have claimed that the WPR has spurred open debate on the issues, thereby educating the public. Unfortunately the debate normally has focused on the WPR and not the wisdom of the foreign policy or national security decisions.<sup>73</sup> Other scholars have claimed that the WPR provides Congress with some control over an otherwise unshackled President. For example, both Presidents Reagan and Bush extended some formal recognition to the WPR to achieve their objectives in Lebanon and South West Asia. One early writer believed that if the WPR produced any prior

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that he was "taking note" of section 4(a)(1) of the WPR, but also stated that the military operation was "ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces").

<sup>69</sup>Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 142 (1988). Groups of congressmen sometimes seek relief in court, but this alternative has been ineffective. See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (Operations Desert Shield and Storm); *Lowery v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *appeal dismissed*, No. 87-5428 (D.C. Cir. Oct. 17, 1988) (naval escort in Persian Gulf operations); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), *appeal dismissed*, 765 F.2d 1124 (D.C. Cir. 1985) (invasion of Grenada); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (alleged covert "war" in Nicaragua); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984) (military advisors in El Salvador).

<sup>70</sup>See Michael J. Glennon, *The Gulf War And The Constitution*, FOREIGN AFF., Spring 1991, at 84; John W. Rolph, Note, *The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm*, 43 MERCER L. REV. 645 (1992) (describing events leading to President Bush's invocation of the WPR in the congressional authorization and the almost immediate disclaimer).

<sup>71</sup>HENKIN, *supra* note 10, at 103 (predicting such circumvention by presidents due to ambiguities in wording).

<sup>72</sup>See generally Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); Clement Zablocki, *The War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579, 593-95 (1984) (arguing threatened use by Congress provided sufficient political leverage to force presidential compromise); Note, *The War Powers Resolution: A Tool for Balancing Power through Negotiation*, 70 VA. L. REV. 1037 (1984); Patrick, *supra* note 51, at 43.

<sup>73</sup>*War Powers Overhaul Proposal*, WASH. POST, May 20, 1988, at A1 (presenting Senator George Mitchell's synopsis of WPR's failure).

consultation or notification, this would be helpful.<sup>74</sup> Other writers have noted that the **WPR**'s existence causes presidents to structure national security decisions more carefully.<sup>75</sup> In almost every case, quantifying such success is extremely difficult. Many of these salutary actions probably would have occurred without the **WPR**. Generally speaking, the "successes" of the **WPR** are more illusory than real.

(c) Congressional Enforcement of the **WPR**.—If Congress really meant to regain a meaningful role in the war powers arena, its reluctance to invoke and enforce the **WPR** has not been indicative of such a resolve. Although Congress intended the **WPR** to be largely automatic and "to control presidential discretion in the event Congress lacked the backbone to do so,"<sup>76</sup> Congress has not met aggressive presidential avoidance with a determined response, at least as an institution. Congress's political will toward sharing the war powers apparently has been grossly overestimated. Fundamentally, Congress overestimated its institutional capabilities with regard to the war powers.<sup>77</sup> The **WPR** resulted from singularly unique historical forces that provided Congress with the resolve to reassert its war powers. However, today's Congress appears institutionally incapable of sharing the war powers to the extent envisioned by the framers.<sup>78</sup>

**3. Conclusions.**—From a legal and experiential standpoint, the **WPR** is a failure. Should something be done, or is the existing arrangement working adequately? Can anything be done, or is every war powers legislation likely to suffer the same fate as the **WPR**? The remainder of this article is devoted to addressing these important issues.

The **WPR**'s failure is instructive, and two important lessons should not be lost to time. First, any new legislation that adopts and maintains an adversative nature probably will fail. The war powers arena is a constitutional "twilight zone,"<sup>79</sup> and the court's abdication means that few of the constitutional issues will be settled definitely—except perhaps unintentionally by way of a collateral adjudication, as in *Immigration & Naturalization Service v. Chadha*.<sup>80</sup> It

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<sup>74</sup>Cruden, *supra* note 10, at 84.

<sup>75</sup>Patrick, *supra* note 51, at 3 (analyzing **WPR**'s role in military operations in Lebanon, Grenada, and Central America).

<sup>76</sup>Glennon, *supra* note 61, at 573.

<sup>77</sup>See *infra* notes 307–14 and accompanying text.

<sup>78</sup>Professor Glennon discusses one aspect of Congress's problem—its institutional amnesia. See Glennon, *supra* note 61, at 576–77. See also Elliot L. Richardson, *Checks and Balances in Foreign Relations*, 83 AM. J. INT'L L. 736, 738 (1989).

<sup>79</sup>*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (Jackson, J., concurring).

<sup>80</sup>*Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

is time to explore alternatives to legislation—such as “constitutional understandings.”<sup>81</sup> Once the political branches achieve a cooperative, accommodative consensus, Congress can consider enacting a “legal” remedy to the war powers dilemma.

Second, the political branches must come to some basic agreement about what the framers intended. This second lesson is really a prerequisite to the first, because this basic agreement must be reached before any cooperative, accommodative consensus is possible. The war powers arena has generated endless constitutional debate. The WPR’s questionable constitutionality has fueled continuing political conflict between the branches and presidential circumvention of the WPR. The framer’s intent is illusive, but discernable by using sound methodologies. Although the framers’ intent cannot be determined with complete certainty, it is sufficient if the political branches can agree, thereby providing a common ground and an essential point of departure for any effective solution.

### III. Constructing a Conceptual Model for the War Powers: Is There Any Substance Within the “Zone of Twilight?”<sup>82</sup>

#### *A. The Illusive “Intent of the Framers”*

Within the war powers arena, scholarly adversaries have been citing the “intent of the framers” for years. Because scholars apparently use this phrase in different ways, a clear definition for use in this article is necessary.

Stated simply, looking for the “intent of the framers” is an attempt to discover the meaning that the drafters gave to the text. Under this definition, the “intent of the framers” does not go beyond the text, though a thorough researcher should carefully consult all available materials in the quest for textual meaning. Declaring that the framers intended anything beyond the text is extrapolation. Extrapolation is necessary, because the text often is insufficient in its specificity and breadth of coverage. Even though these two concepts must be kept distinct, they are nevertheless interrelated. Discovering the “intent of the framers” consists of reconstructing the original conceptual models held by the framers

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<sup>81</sup> QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* §§ 244–258 (1922) (describing indispensable concept of establishing informal, extra-constitutional arrangements and understandings, especially between political branches, to facilitate development and execution of America’s foreign policy).

<sup>82</sup> *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring).

and manifested in the text. Subsequently, these models provide the foundation and set parameters for necessary extrapolations.<sup>83</sup>

When analyzing the war powers, scholars need to clearly differentiate between the “intent of the framers,” which represents an historical question, and subsequent extrapolation, which tends to represent what should be—a normative question. The original conceptual models came first, and extrapolation builds on these models. But some scholars try to develop the original models primarily by citing subsequent extrapolations for support. They refer to these extrapolations as contemporaneous constructions or practices.<sup>84</sup> This is a dangerous methodology.

Some scholars confuse their analysis by introducing normative arguments. Extrapolations may be consistent with the “intent of the framers,” but they need not be if the original models have become unworkable due to the ever-changing world. The framers were not adverse to breaking with traditional thought, experimenting with hybrid governmental forms, or allowing “experience” to become the basis for change.<sup>85</sup> Consequently, the Constitution provides a formal amendment procedure, and the original models are sufficiently general to accommodate informal modification. Discovering original

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<sup>83</sup> Chief Justice John Marshall established special guidelines for interpreting the Constitution, *as* opposed to ordinary legislation. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), he stated:

Its [the Constitution] nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which comprise those objects be deduced from the nature of the objects themselves.

Chief Justice Marshall apparently thought that ultimate parameters on extrapolation arose from the “great outlines” provided by, and the “important objects designated” in, the text. See also Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. Rev. 109, 121–22 (1984) (“The adaptivist approach . . . downplay[s] the primacy of the Constitution *as* originally conceived; the approach relies instead on subsequent practice . . . The adaptivist approach prefers a Constitution that is all sail, threatening the very purpose of a written Constitution . . .”). The conceptual models provide an anchor for the boat.

<sup>84</sup> The author uses the term “contemporaneous construction” generically to mean any contemporary writing, spoken word, or action that scholars consider *as* providing meaning to the text of the Constitution. See generally BLACK’S LAW DICTIONARY 318 (6th ed. 1990) (defining latin term *contemporanea expositio*—contemporaneous exposition, or construction; a construction drawn from the time when, and under which, the subject-matter to be construed, *as* a statute or custom, originated). See *infra* notes 235–60 and accompanying text.

<sup>85</sup> As James Madison stated at Virginia’s ratification convention: “[T]he organization [of the government] . . . was, in all its parts very difficult. There was a peculiar difficulty in that of the executive . . . That mode which was judged most expedient was adopted till experience should point out one more eligible.” 3 JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION* 531 (photo. reprint 1974) (2d ed. 1968) [hereinafter *Elliot*]. See also W. Taylor Reveley, III, *Constitutional Allocation of the War Powers Between the President and Congress: 1787–1788*, 15 VA. J. INT’L L. 73, 76–77 (1974).

intent involves careful analysis of the text and the historical context. It should not involve attempts to justify what should be. Scholars must take the text **as** they find it. Once they develop the original models, they can rationally decide if these models are workable in a modern context, or whether they need to be changed. Consciously deciding to formally amend or informally modify the Constitution because the original models have failed is a separate issue altogether. Scholars must always keep this in mind.

In the areas of foreign relations and the war powers, historical practice has had a powerful influence because the Constitution has left so much to extrapolation. Practice arguably has served **as** an extra-constitutional text in these two areas, but most scholars would agree that this process has its limits. If practice becomes a means to amend or modify the Constitution inconsistently with the original model, a constitutional problem exists. The Constitution should not become a self-amending document based on gradual extrapolation; otherwise, America's claim of constitutional government becomes a myth.

In simple terms, the foregoing is the essence of the war powers dispute. ~~Has~~ practice taken us too far? To answer this, one needs to return to the Constitution to discover the "intent of the framers."

**1. The Problem.**—The threshold issue is whether the "intent of the framers" can be discovered with sufficient certainty to construct a useful conceptual model. Three major obstacles are involved in this discovery process: first, the record is inadequate; second, the framers used procedures that make it difficult to discern the common intent; and third, the framers used vague and general words to manifest their intent. Given these significant obstacles, it **is** easy to see why scholars differ so greatly. The key is in the methodology. To eliminate all uncertainty is impossible, but the chosen methodology should reduce uncertainty regarding these three obstacles.

## **2. The Methodology**

(a) *The Inadequate Record.*—Working with an inadequate record is the challenge of all historians. In the reconstruction of any historical event, acceptance of some uncertainty is necessary because developing better records is normally impossible.<sup>86</sup> With the

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**\*\*However, the next edition of Max Farrand's *Records of the Federal Convention* apparently will incorporate new materials not originally available to Farrand. See *Publisher's Note* to MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION* iii (Yale University Press ed., 1966) (1911) [hereinafter *FARRAND*]. See also 1 *Id.* at xxiii-xxiv (discussing other records of federal convention that reportedly exist, but have not been uncovered).**

Constitution, this challenge is acute, because the federal convention that yielded this document was closed to the public, and only two complete records of the convention exist.<sup>87</sup> Additionally, these records often are incomplete and confusing.<sup>88</sup> Comprehensive research from original sources reduces the uncertainty with respect to this obstacle. All relevant information should be analyzed and interpreted consistently. So much has been written on the war powers that over-reliance on anything other than original sources introduces the danger of using information that has been interpreted and reinterpreted by several layers of scholars. Finally, certain areas of the Constitution—such as the war powers—receive scant treatment both textually and in the convention’s debates. Where the available information is thin, the meager text must be interpreted in light of the whole document.

The methodology used in this article minimizes uncertainty by intensively examining the war powers text with the use of original sources. Next, it confirms and expands the meaning by resorting to other interpretive aids: consideration of the logical consistency

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<sup>87</sup>The first complete record is by William Jackson. The convention designated Jackson as the official secretary, and he kept the official “Journal.” Jackson apparently was not very conscientious in his work, and unfortunately, the delegates did not immediately verify or correct his effort. It eventually was published by order of Congress in 1819, after most of the delegates had died or had forgotten the specifics. John Q. Adams, then Secretary of State, compiled the journal. Adams had great difficulties in assembling haphazardly kept notes, despite correspondence with Jackson (who was of little help). Jackson apparently destroyed all of his collateral notes and “loose scraps of paper” shortly after the close of the convention. In the end Adams considered his work a “correct and tolerably clear view of the proceedings.” The journal reads like “daily minutes” and captures little more than the motions and subsequent votes. 1 FARRAND, *supra* note 86, at xi-xiv.

The most important complete record is based on James Madison’s notes of the proceedings. Madison took notes on the actual debates. Madison “revised” his notes sometime after publication of Jackson’s journal so that the two would be consistent, thereby incorporating Jackson’s errors. This effectively eliminates the salutary condition of having two independent accounts of certain events. 1 *Id.* at xvi-xvii. His record was not published until 1840, four years after his death. It was compiled when he was at least 70 years old—a long time after the convention. 1 *Id.* at xviii & n.20, xix.

Robert Yates kept an account until the New York delegation left the convention on July 5, 1787. His writings, published in 1821 to attack James Madison, a presidential candidate, did not give “a complete picture of the proceedings, though they threw a great deal of light on what had taken place and in particular on the attitude of individual sin the debates.” 1 *Id.* at xiv-xv.

Several other delegates kept partial notes of the convention.

<sup>88</sup>See generally Reveley, *supra* note 85, at 73 (examining intent of framers and ratifiers concerning the war powers in great detail). For example, on August 17, 1787, the convention considered Congress’s war powers. For this critical debate Jackson and Madison’s records are ambiguous on the specific questions placed before the delegates, are incomplete concerning the debate, and actually differ as to the outcome of the first vote and the number of times the delegates voted. Because the record is unclear, the framers’ precise intent in changing “make war” to “declare war” never can be known with certainty. *Id.* at 103, 106. See *infra* notes 167-70 and accompanying text.

between the express grants and interpretation in light of the Constitution **as** a whole.

(b) *The Problematic Procedures.* —The procedures used by the framers make it doubtful that any precise common intent ever existed.<sup>89</sup> Approximately fifty-five men<sup>90</sup> with widely divergent views drafted the Constitution.<sup>91</sup> The extent of any delegate's influence will never be known with certainty, although specific framers, such **as** James Madison, had more impact than others.<sup>92</sup> No single man, or group of men, had sufficient influence at the convention to say that their view was the pervasive view. The entire process was one of grand proposals, debate, negotiation, compromise, drafting, more debate, more negotiation, more compromise, and eventually the casting of votes.<sup>93</sup> The framers' potentially divergent views complicate all attempts to accurately interpret and use contemporaneous construction to provide textual meaning.<sup>94</sup> The official record reflects divided votes on various motions and demonstrates the lack of unanimity. Even those framers who voted together may have held differing shades of meaning for the text. But the final text ultimately reflects the majority's will and vote, which constitutes common intent in a democracy. Thus, reliance on the text as a foundation for the extrinsic materials reduces the risk of uncertainty with respect to this obstacle.

The methodology used in this article minimizes uncertainty by

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<sup>89</sup> Cf. WILLIAM WHITING, *WAR POWERS AND THE CONSTITUTION OF THE UNITED STATES* (10th ed. 1864) (asto the interpretation of article I, section 8, clause 1, of the Constitution: "Washington, Adams, Jefferson, Madison, Monroe, Hamilton, Mason, and others, were quite at variance **as** to the true interpretation.").

<sup>90</sup> See generally CLINTON ROSSITER, 1787: *THE GRAND CONVENTION passim* (1966) (showing nonstatic nature of number of delegates attending federal convention).

<sup>91</sup> CHARLES A. BEARD AND MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 330 (1945) (quoting General George Washington, President of the federal convention: "The constitution that is submitted is not free from imperfections. But there are a few radical defects in it **as** could well be expected, considering the heterogeneous mass of which the Convention was composed and the diversity of interest that are to be attended to . . ."); see also 3 FARRAND, *supra* note 86, at 70.

<sup>92</sup> *The United States Constitution*, in 20 *THE WORLD BOOK ENCYCLOPEDIA* 128 (1973 ed.) [hereinafter *WORLD BOOK*] (discussing constitutional convention generally and stating that James Madison, who won title of "Father of the Constitution," was the most influential delegate from the standpoint of his speeches, negotiations activities, and attempts to create compromises for the great divisive issues; after Madison, George Washington was influential in an intangible sense; then came Gouverneur Morris, the draftsman).

<sup>93</sup> See generally ROSSITER, *supra* note 90 *passim* (describing general process by which framers arrived at final text).

<sup>94</sup> 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 406 (3d ed. 1858) [hereinafter *STORY*] (discussing the problem implicit in all uses of contemporaneous constructions—the lack of common understanding of what the Constitution meant, even among primary actors during the earliest days of the Republic; also arguing that passage of time decreases authoritativeness of such constructions).

primarily focusing on the text and intrinsic analysis. Secondly, the methodology turns to extrinsic materials only as they confirm and give full meaning to the text. Finally, although this article considers a broad range of extrinsic materials, an evaluation of their evidentiary value precedes each consideration.

(c) *Deliberately Vague and General.*—The Constitution is a “blueprint” for national government,<sup>95</sup> and the framers intentionally crafted a document suited for such a task.<sup>96</sup> Two essential characteristics were: first, the document required inherent elasticity to provide for the innumerable specific situations that never could be addressed in detail; and second, the document required inherent flexibility so that it could be adapted to the ever-changing context.<sup>97</sup> The framers focused on general principles, not specific details. They designed their conceptual models to provide guidelines for the subsequent development of specific details. An enormous amount of detail is intentionally missing, which leaves room for extrapolation. This frustrates some scholars; others regard the deliberate ambiguity as exploitable. The latter scholars become dangerous if they indiscriminately try to extract detailed textual meaning from extrinsic materials of doubtful evidentiary value.

The methodology used in this article minimizes uncertainty by realizing that any conceptual model will be very general and will deal only with guiding principles. This article will not attempt to build a highly detailed, comprehensive model for the war powers by citing vast amounts of questionable extrinsic materials. Ascribing such detail to the “intent of the framers” is just as erroneous as denying that a conceptual model for the war powers exists.

## *B. Constructing the Original Conceptual Model for the War Powers*

*1. Overview of the Process.*—The primary focus is on the text of the Constitution and related intrinsic analysis. The three areas of inquiry are: the relevant text; its logical consistency; and its consistency within the document as a whole. The secondary focus is on the extrinsic materials, such as historical antecedents and contem-

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<sup>95</sup> HENKIN, *supra* note 10, at 3.

<sup>96</sup> 2 FARRAND, *supra* note 86, at 137 (drafted by Edmund Randolph, with emendations by John Rutledge, as the introduction to the first draft of the Constitution: “In the draught of a fundamental constitution, two things deserve attention: 1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events and 2. To use simple and precise language, and general propositions. . .”).

<sup>97</sup> Cf. Eugene V. Rostow, What *the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 188, 188–89 (1988) (reiterating in a modern forum Chief Justice John Marshall’s view of the Constitution: an outline for national government).

poraneous construction, because they provide meaning to the text. Though the primary focus is on the intrinsic materials, this discussion will flow chronologically. It begins with the extrinsic historical antecedents, then moves to the intrinsic text, and concludes with the ratification process materials and contemporaneous construction.

2. *Extrinsic Materials: Historical Antecedents.*—Historical antecedents can be divided into two categories: the framers' intellectual foundations and the framers' experiential backgrounds. The difficult issues involve determining the effect each of these antecedents had on the resultant text. This is simply another way of determining the amount of evidentiary weight to ascribe to each of these extrinsic materials. The difficulties in resolving these issues are numerous, and the level of uncertainty is high. An honest researcher is unable to draw many conclusions concerning the effects of these antecedents without becoming speculative.

(a) *Intellectual Foundations: What Was in Their Minds?*—The framers were products of the Age of Enlightenment.<sup>98</sup> They considered their task a grand experiment in political science and they unashamedly approached it that way.<sup>99</sup> Whether they recognized it or not, their approach resembled the scientific method that was an outgrowth of their age. For their experimentation and observations they drew on history, both ancient and their own recent experiences. They also consulted contemporary political thinkers who had begun formulating theories to govern political science.<sup>100</sup> The framers considered what would work in a nation like theirs in light of historical experiences and emerging theories. Through debate and compromise, the framers produced rational solutions that they thought would work. This led to a unique governmental

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<sup>98</sup>The Age of Enlightenment, sometimes called the Age of Rationalism, began in the 1600s and lasted until the late 1700s. Philosophers of this period emphasized the use of reason to arrive at truth, but this did not mean a resort to purely theoretical thought. There was a reliance on scientific methodology: experimentation, careful observation, and rationalizing to form conclusions. Many of the great thinkers of this period significantly influenced the framers—men like Locke, Montesquieu, Rousseau, Voltaire, and Descartes. In the emerging area of politics, Montesquieu had analyzed the experiences from ancient and contemporary societies and had attempted to develop a “science.” This became the rudiments of today’s political science. See 1 WORLD BOOK, *supra* note 92, at 130a-30b (*The Age of Reason*).

<sup>99</sup>THE FEDERALIST No. 9, at 126 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); Wright, *supra* note 81, at 86.

<sup>100</sup>Douglass Adair, *That Politics May Be Reduced to a Science: David Hume, James Madison and the Tenth Federalist*, in FAME AND THE FOUNDING FATHERS 93, 93-100 (1974) (arguing that framers generally were students of other great philosophers of the Age of Enlightenment—Bacon and Newton—and others who were all Scottish, such as Francis Hutchinson, David Hume, Adam Smith, Thomas Reid, Lord Kames, Adam Ferguson; discussing application of “scientific knowledge” to government and politics).

form. They did their best and left the rest for the nation to correct based on subsequent experiences under the new Constitution.<sup>101</sup>

With respect to the specifics of their intellectual foundation, there are several intractable issues. Which sources made up this foundation? Which ideas were actually incorporated into the text? To what extent were these ideas adopted without modification?

Difficulty exists in identifying the specific sources known to the framers.<sup>102</sup> Fortunately, the framers lived when the curriculum for formal education was limited and works dealing with political science were even more limited. The delegates to the federal convention were generally well educated for their day.<sup>103</sup> They probably studied the Greek and Roman classics, which would have provided helpful case studies on democratic and republican forms of government.<sup>104</sup> The framers often cited examples from ancient Greece and Rome to bolster their arguments during debates and in their writings.<sup>105</sup> Many would have studied Sir William Blackstone,<sup>106</sup> John Locke,<sup>107</sup> and Montesquieu.<sup>108</sup> Each of these men wrote important and popular works on the theory and practice of law and government. One can only speculate, however, as to all of the sources known to the framers.

<sup>101</sup>THE FEDERALIST No. 85, at 546-47 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>102</sup>CORWIN, *supra* note 33, at 7 (discussing sources for framers' concept of executive power and mentioning that "Locke, Montesquieu, and Blackstone were common reading to them all," without further explanation). In many works this simply is assumed, *see* TURNER, *supra* note 10, at 53. *See generally* CHARLES C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 (1922).

<sup>103</sup>*See supra* notes 98, 100.

<sup>104</sup>Douglass Adair, *Experience Must Be Our Only Guide, in* FAME AND THE FOUNDING FATHERS 107-08, 114-15 (1974).

<sup>105</sup>Farrand's record of the convention notes twenty-six occasions when the delegates directly referred to ancient Greece, either the city-states or the leagues, and sixteen occasions when the delegates cited ancient Roman situations. 1-2 FARRAND, *supra* note 86, *passim*. *See also* 3 *Id.* at 87-97 (presenting William Pierce's character sketches of his fellow delegates at the federal convention, noting that several of the most qualified were well versed in the "classics"). *See generally* THE FEDERALIST No. 70, at 451 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (typifying Hamilton's propensity to cite examples from the "classics").

<sup>106</sup>2 WORLD BOOK, *supra* note 92, at 312 (*Blackstone, Sir William*) (discussing Blackstone as a prominent English judge, author, and professor; his famous work, *Commentaries on the Laws of England*, being the basis for a legal education in England and America in the late eighteenth century and providing colonists their chief source of information about English law).

<sup>107</sup>Because the framers were predominantly English, Scottish, or Irish, and they needed a source book for creating a government, they undoubtedly drew on John Locke's famous work, *Two Treatises of Government*. *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27-30 (1967) (discussing Locke's influence on framers).

<sup>108</sup>Baron de Montesquieu's (real name Charles de Secondat) influence on the framers is readily seen in what they said during and after the federal convention, as

Determining which ideas the framers adopted and in what form they adopted them is even more difficult. The framers expressly adopted certain ideas and rejected others. For example, the framers expressly adopted such broad ideas as the separation of powers, systemic checks and balances, and republicanism; but they modified nearly every idea.<sup>109</sup> Unfortunately, most ideas fall somewhere on a continuum of uncertainty between the extremes of express adoption and express rejection. The framers certainly were innovators; they did not blindly follow any particular idea on government. As James Madison admitted in *The Federalist Papers*, the framers

paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience.<sup>110</sup>

The challenge of reconstructing the framers' intellectual foundations is laden with uncertainty. Outside of a few expressly adopted ideas, specific conclusions about how the framers' intellectual foundations affected the text are speculative.<sup>111</sup> To reduce uncertainty, conclusions about the effects of the framers' intellectual foundations must be considered in light of their experiential backgrounds. Ideas from the former were used as the tools to correct defects revealed by the latter.

(b) *Experiential Backgrounds: What Was on Their Minds?*

(i) *British Heritage.*—A great majority of the framers had a British cultural background. Consequently, they knew of the historical power struggles between the monarch and Parliament. They knew of the general trend during the seventeenth and eighteenth

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well as in the text itself. As one of the first political scientists, Montesquieu's work, *The Spirit of Laws*, probably proved a valuable textbook for American political writers and thinkers. This massive work was actually a "compendium of the behavioral sciences," representing application of the Newtonian style (scientific methodology and reasoning) to advance the bounds of knowledge, or at least theory, in the fields of politics, economics, law, and sociology. See Adair, *supra* note 100, at 94–95.

<sup>109</sup> See THE FEDERALIST No. 51, at 357 (James Madison) (Benjamin F. Wright med., 1961) (Madison states that framers created a "compound republic," a unique idea that framers derived from the well known principle of republicanism and employed to protect the liberties of the people from tyrannical government); see also *id.* No. 47 (James Madison) (Madison's argument against objection that proposed Constitution violated separation of powers maxim because there was a frequent blending of powers between the three branches). See *infra* note 194.

<sup>110</sup> THE FEDERALIST No. 14, at 79 (James Madison) (Benjamin F. Wright ed., 1961).

<sup>111</sup> See generally ROBERT L. SCHUYLER, THE CONSTITUTION OF THE UNITED STATES: AMERICAN HISTORICAL SURVEY OF ITS FORMATION 90–91 (1923) (denying framers dependence on historical antecedents).

centuries for Parliament to gain power at the expense of the monarch;<sup>112</sup> but they undoubtedly remembered the period when the monarch exercised the war powers (and the foreign relations powers) pursuant to “royal prerogative.”<sup>113</sup> Under that system, the monarch could decide to make war and execute the decision. Even the influential Locke, who venerated limited government under law, supported the concept of prerogative. Locke coined the term “federative” power,<sup>114</sup> that included many of the powers associated with prerogative. In Locke’s methodology, this “federative” power was an executive function.<sup>115</sup>

Although our framers adopted much from their British heritage<sup>116</sup> and Locke, they considered prerogative a defect and rejected the concept.<sup>117</sup> British history reflected abuse of the war powers by

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<sup>112</sup> ERNEST R. MAY, *THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF* 13–19 (1960) (discussing Parliament’s increasing authority concerning war powers). *But cf.* ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER* 6–13 (1976) (discussing use of British history to interpret United States Constitution and concluding that inferences are problematic due to drastic fluctuations of war and foreign relations powers between monarch and Parliament during three centuries prior to 1787; stating that real contributions of British experience were concepts of separation of powers and counterpoised pressures—that is, balanced government).

<sup>113</sup> See EDWARD KEYNES, *UNDECLARED WAR* 11–16 (1982); Reveley, *supra* note 85, at 87–88 (discussing how framers tended to focus on the British Monarch of the seventeenth century (the monarch which Locke addressed), rather than more restrained eighteenth century chief executive); I FARRAND, *supra* note 86, at 65 (reflecting Charles Pinckney’s dismay over proposed Virginia Plan, which appeared to give powers of war and peace to executive; he states that new executive would then be a monarch “of the worst kind”).

<sup>114</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 381–85 (Peter Laslett ed., 1967).

<sup>115</sup> CORWIN, *supra* note 33, at 7–8, 147; HENKIN, *supra* note 10, at 297 n.10; KEYNES, *supra* note 113, at 13–14.

<sup>116</sup> KEYNES, *supra* note 113, at 12 (characterizing primary contributions of British heritage as concepts of balanced government, separation of powers, limits on all governmental power, and rule of law).

<sup>117</sup> CORWIN, *supra* note 33, at 416 n. 1 (discussing how framers consciously chose to ignore the theories of Blackstone, Locke, and Montesquieu with respect to placing war powers—and foreign relations power—solely in hands of executive); KEYNES, *supra* note 113, at 11–12, 22–30.

This choice is in accordance with the framers’ fear of allowing too much governmental power to be concentrated in any branch or office. The *FEDERALIST* No. 48, at 343 (James Madison) (Benjamin F. Wright ed., 1961). Some of the framers originally had proposed a multiheaded executive. The unitarians prevailed] but the majority of framers used every possible occasion to check the executive powers with legislative powers. HENKIN, *supra* note 10, at 33. “If one could not change human nature, one could at least counteract vice with vice, power with power, and ambition with ambition . . .” KEYNES, *supra* note 113, at 16.

This line of reasoning also undermines the timeless argument that the Article II, section 1, clause 1 “vesting clause” is some vast, unrestricted reservoir of executive power. See KEYNES, *supra* note 113, at 20–21 (arguing that Hamilton, Madison, Charles Pinckney, and other framers who expressed their views on presidency defined the executive power in a limited sense, such as for the administration of government); I FARRAND, *supra* note 86, at 65–66 (reflecting sentiments of James Wilson during dis-

monarchs armed with prerogative. The framers consciously determined to avoid such abuse<sup>118</sup>—even at the expense of accepting a less efficient government.<sup>119</sup> As pragmatists, the framers probably realized that the states would reject a unitary executive which too closely resembled a monarchical form.

(ii) *Colonial Experiences with the Homeland.*—The relationship between Britain and her American colonies deteriorated steadily from 1760 until the Revolutionary War.<sup>120</sup> The colonists felt betrayed by their homeland—both economically and politically. Taxation without consent **was** oppressive. Britain's repeated interference with colonial legislatures and individual liberties was intolerable. Correct or not, the colonists directed much of their acrimony towards the monarch.<sup>121</sup> The Declaration of Independence reads like a multiple count indictment against the monarch's "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states."<sup>122</sup> Particularly offensive was the monarch's stationing of British and foreign mercenaries in the colonies to enforce his repressive policies.<sup>123</sup> The framers did not

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cussion of the Virginia Plan which provided for a unitary executive: "He did not consider the Prerogative of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature."). *Accord* *Id.* at 65 (reflecting sentiments of John Rutledge during discussion of the Virginia Plan: "[He] was not for giving [the executive] the power of war and peace.").

<sup>118</sup>See Reveley, *supra* note 85, at 88 & n.42, 88–89 & n.43 (discussing prevailing view that a monarch would engage nation in military adventurism for his own personal reasons independent of the voice of the people).

<sup>119</sup>Conventional wisdom, represented by Locke and other theorists, posited that the executive branch should handle foreign and military matters because of the institutional advantages of the executive over the legislative branch—namely, speed, secrecy, and dispatch. See CORWIN, *supra* note 33, at 416–18 n.1; HENKIN, *supra* note 10, at 297 n.10; WRIGHT, *supra* note 81, at 141–43, 363–65. The framers understood the inefficiencies they were introducing and tried to mitigate the adverse effects by creating a hybrid form of government.

<sup>120</sup>Charles J. Cooper, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 168 n.17 (1988).

<sup>121</sup>King George III, unlike his two German ancestors, was born in England. He initially regained some of the traditional monarchical influence and authority lost to Parliament and the cabinet by his predecessors. He employed a policy of force against the American colonies, which failed. King George III was the last monarch to have a direct role in British government. 8 WORLD BOOK, *supra* note 92, at 334 (Great Britain).

But Parliament and the King's cabinet shared some guilt with the monarch. Reveley, *supra* note 86, at 88 n.43 (discussing framers' knowledge that, by the late 1770s, Parliament constrained most monarchical prerogatives and offering an explanation for framers' frequent attacks on kingly prerogatives); *id.* at 88, n.39 (arguing that colonists tempered their aversion to the presidency, which to a certain extent resembled a monarch, with awareness that Parliament was at least partially responsible for colonial difficulties with Britain).

<sup>122</sup>THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

<sup>123</sup>*Id.* at paras. 16, 17, 19, 20, 28, 29, 30. See also MAY, *supra* note 112, at 9 (concerning colonists' unpleasant experiences with colonial British commanders-in-chief).

forget the revolutionary) antimonarchical fervor which peaked in **1775-1776**, nor did they forget the monarch's abuse of the war powers. Professor Convin states: "The colonial period ended with the belief prevalent that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty, a sentiment strengthened by the contemporary spectacle of George III's domination of Parliament."<sup>124</sup>

Monarchical abuse of power was the British government's failure that the framers sought to remedy. However, the framers balanced these bitter memories against their even more recent experiences with the ineffectiveness of governments lacking an executive.

(iii) *Early Independence and State Governance.*—The new independent states rejected the British monarchical form. Unfortunately, this broad-based, popular rejection led to a gross overreaction as manifested in the form of governments adopted by the respective states.<sup>125</sup> Several hastily drawn state constitutions completely rejected the British concept of a balanced government: "separation of powers" amongst various branches in government and creation of a system of counterpoised "checks and balances." The legislatures or assemblies in most states became the dominant, if not sole, branch in government.<sup>126</sup> By **1787**, legislative abuse of power was so egregious and the failure so complete that the framers knew they must resurrect the concept of balanced government.<sup>127</sup>

(iv) *Governing Under the Articles of Confederation: 1781-1788.*—Governance under the Articles of Confederation was nearly impossible. Repudiation of the monarchical form had carried over into national government. There was no executive, only a feeble Continental Congress. Tyrannical rule by this legislative body was not a problem, because the national government wielded so little power. This situation led to innumerable domestic and foreign problems.<sup>128</sup> The lack of an executive proved especially troublesome in

<sup>124</sup> CORWIN, *supra* note 33, at 5-6.

<sup>125</sup> See BEARD & BEARD, *supra* note 91, at 297-309 (discussing how revolutionary zeal in **1775-1776** led to a general repudiation of the British Crown and all it represented, and gave rise to a populism that ultimately led to the period of "legislative despotism").

<sup>126</sup> See KEYNES, *supra* note 113, at 17; *id.* at 17 n.44 (discussing aberrant Pennsylvania constitution, which had an assembly, an executive council, and a president); *id.* at 17-18 (discussing how New Hampshire and Massachusetts, which both had express separation of power provisions, fell into the dominance of the legislature).

<sup>127</sup> *Id.* at 18 (discussing how Thomas Jefferson coined phrase "legislative despotism" to describe the situation and explaining that framers believed that despotism from any source, whether the monarch or popular assembly, was an anathema to free government; this was key in framers' decision to create a government of carefully and expressly limited powers).

<sup>128</sup> 1 STORY, *supra* note 94, at 181-85 (discussing major defects in Articles of Confederation). See also 1 FARRAND, *supra* note 86, at 18-19 (Edmund Randolph's

the conduct of foreign relations and military operations.<sup>129</sup> The framers went to Philadelphia, Pennsylvania to amend the Articles, but because the problems were so numerous and fundamental, the delegates decided to create and propose a radically new government.

Experience taught the framers another important lesson during this period: the war powers needed to be fixed to guarantee effective common defense. Beginning with the Revolutionary War, Continental Congress's best attempts to make war were essentially failures. Congress had the good sense to appoint General George Washington as Commander-in-Chief, but they immediately restricted his freedom of action by trying to manage the Army and military operations. This arrangement failed miserably, and Congress gradually surrendered their powers to the field commander.<sup>130</sup> After the Revolutionary War, there were occasional threats to the nation. A continuing need to deal effectively with Indians on the frontiers and with insurrections at home arose.<sup>131</sup> European colonies surrounded the new nation and posed a continuous threat. After experiencing near disaster under the Articles, the framers knew that they must assign control of military operations to a chief executive.<sup>132</sup>

The precise effect of historical antecedents on the actual text is difficult, if not impossible, to assess. The framers went to Philadelphia armed with a grand assortment of ideas and theories on how

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enumeration of serious national problems under Articles of Confederation mentioned before presenting Virginia Plan at the convention); *see also* Letter from George Washington to Thomas Jefferson (May 30, 1787), *in* 11 WRITINGS OF GEORGE WASHINGTON 158-59 (W.C. Ford ed., 1889), *reprinted in* 3 FARRAND, *supra* note 86, at 31 (lamenting dire situation under Articles of Confederation and stating: "[F]or the situation of the general government, if it can be called a government, is shaken to its foundation, and liable to be overthrown by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue.").

<sup>129</sup> *See* Reveley, *supra* note 85, at 93-95.

<sup>130</sup> *Reveley, supra* note 85, at 91; *War-Power Legislation, 1971: Hearings on S. 731 S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 77-78 (1977) (remarks of Richard B. Morris); Bennett N. Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 51, 53-54 (1965) (discussing how Continental Congresses tried to manage military operations through a number of boards and subcommittees, which were assigned specific areas of responsibility—mobilization, tactics, and strategy; how efforts proved ineffective, and eventually led to delegation of vast powers to George Washington as Commander-in-Chief).

<sup>131</sup> Shays' Rebellion in Massachusetts was relatively fresh in the framers' minds as they arrived in Philadelphia. This small insurrection served to underscore the urgency of the need for a stronger national government. The rebellion is referenced six times during debates at the convention. 1 FARRAND, *supra* note 86, at 18, 48, 318, 406, 423; 2 *id.* at 317, 332n.

<sup>132</sup> THE FEDERALIST No. 74, at 473 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); *see generally* THE FEDERALIST No. 23 (Alexander Hamilton): 2 FARRAND, *supra* note 86, at 318-19.

to construct an effective government that still would preserve individual liberties. The framers also intended to address a host of problems that experience had revealed. They drew on the experiences of other societies throughout history and scrutinized their own unique, American experiences. Fixing the war powers was only one of many challenges, and it did not occupy much of their time because the framers thought that they had a fairly simple, rational solution.

The historical antecedents appear to have had three traceable effects on the framers' unique solution to the war powers problem. First, experience had taught the framers that the new government needed an executive. Theorists agreed that the full war powers were an executive function, but the concept of an executive with prerogative was unacceptable. Therefore, the framers had to divide the war powers between the two political branches. Second, the framers' affinity for legislative dominance, and suspicion of executive power, mandated assignment of the awesome decision to declare war to Congress. The executive was left with the power to control war, which required the executive's strength and unity. Third, this divided arrangement corresponded with the perceived need to resurrect balanced government where neither branch could abuse the war powers.

**3. *Intrinsic Materials.***—Conclusions about the meaning of the Constitution based solely on historical antecedents are speculative. Antecedents provide a critical backdrop that affords wider meaning to the text and enhances understanding. Historical antecedents set the stage for the text, but nothing more. The text provides the most important materials. The document represents the ultimate product which flowed from the framers' after they considered the antecedents. The words reflect, though often imperfectly, the true "intent of the framers" which was forever fixed in time. Madison once wrote:

In order to understand the true character of the [C]onstitution of the United States, the error, not uncommon, must be avoided, of viewing it through the medium [of another governmental form], whilst it is . . . a mixture of both. And having no model, the similitude and analogies applicable to other systems of government, it must, more than any other, be its own interpreter according to its text. . . .<sup>133</sup>

As Madison pointed out, because America's Constitution is unique, focusing on the text is the key to unlocking its true meaning.

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<sup>133</sup> Letter from James Madison to Mr. Edward Everett (August 1830), reprinted in 1 STORY, *supra* note 94, at 277.

(a) *The Text and What It Meant.*—The Constitution says little about the war powers. The convention debates pertaining to these provisions are short and sometimes confusing. The only express war powers provisions empower the Congress to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”;<sup>134</sup> the President is made the “Commander-in-Chief.”<sup>135</sup> The paucity of text to control such an important and increasingly complex arena as the war powers may explain the extensive, and often confusing, resort to extrinsic materials. The framers did not face these complexities in 1787.<sup>136</sup> They undoubtedly thought that their treatment was simple, yet sufficient.<sup>137</sup>

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<sup>134</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>135</sup> U.S. CONST. art. II, § 2, cl. 1. Many scholars now claim that the clause vesting the “executive power” in the President is also a broad grant of war power. *Id.* art. II, § 1. See *supra* note 117. This argument apparently originated with Alexander Hamilton, when he wrote as Pacificus in his debates with Helvidius (Madison) concerning George Washington’s power to proclaim neutrality. Hamilton’s argument gained little ground with the framers, but the Civil War gave real vitality to his theory. Cruden, *supra* note 10, at 46. This position has flaws, however. First, this argument is inconsistent with the principle of limited government. The logic may be used to justify expansion of the executive’s powers far beyond the specifically enumerated powers within the Constitution. See CORWIN, *supra* note 33, at 3–4. Arguably, no need for such a broad interpretation of the vesting clause exists. Congress, through the expansively interpreted “necessary and proper clause,” is capable of providing for any war powers contingency or delegating such powers to the executive to act at his discretion. Second, this argument is inconsistent with the principle of separation of powers to the extent it justifies expansion of the executive’s power into the war powers granted to the legislative branch. See WRIGHT, *supra* note 81, at 95–96 (arguing that the three constitutional vesting clauses merely imply adoption of the doctrine of separation of powers and that these clauses “cannot, therefore, be made the basis of powers other than essentially inherent power” for the executive and the judicial departments). But see 1 STORY, *supra* note 94, §424.

Another common argument is that the “shall take care” clause, when read in conjunction with the “Commander-in-Chief” provision, grants the executive almost supreme control of the war powers. U.S. CONST. art. II, § 3. President Abraham Lincoln introduced and developed this argument during his presidency. See generally CORWIN, *supra* note 33, at 23–24, 227–34. Civil War and subsequent Reconstruction practices should be considered a special category of precedents, for they arose out of a special context. See Biden & Ritch, *supra* note 32, at 378. See generally HENKIN, *supra* note 10, at 54–56 (stating that originally “the principle purport of the clause, no doubt, was that the President shall be a loyal agent of Congress to enforce its laws”; discussing growth of this clause as a source of presidential power based on subsequent practices); *id.* at 157–59 (discussing how modern presidents have used “take care” clause to expand executive’s decisional war powers with respect to determining and enforcing international obligations by deploying forces to foreign nations pursuant to defense treaties and less formal agreements).

<sup>136</sup> See *infra* notes 317–31 and accompanying text.

<sup>137</sup> Two of the Constitution’s grand objectives were to “insure domestic Tranquility [and] provide for the common defence.” U.S. CONST. pmbl. The framers apparently believed that to quell insurrections at home, repel foreign invasions, control the Indian tribes, and protect commerce (primarily with the U.S. Navy), their meager treatment of the war powers had covered all the major issues. See THE FEDERALIST No. 23 (Alexander Hamilton) (indicating that all constituent elements for providing an effective “common defence” were expressly stated in text).

(i) Congress: *The Decisional*<sup>138</sup> War Powers.—What did the framers mean when they assigned three express war powers to Congress? As with other legal documents, constitutional interpretation should conform to accepted canons of construction. One important canon is the literal interpretation rule.<sup>139</sup> In his commentary on the Constitution, Professor Joseph Story states: “The first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms, and the intention of the parties.”<sup>140</sup> Applying an historical meaning to the critical terms—as the framers would have understood them—is essential.

The term “declare war” had a much broader connotation than some scholars give it. Though formal declarations of war were nearly obsolete even in 1787, their effect was understood by the framers.<sup>141</sup> To construe this grant as merely giving Congress the power to formally declare war is unduly restrictive.<sup>142</sup> Such a construction violates the rule of interpretation which requires maximum effect for each term and rejects constructions which defeat the term’s apparent purpose.<sup>143</sup> This construction also ignores the framers creation of an adaptable document<sup>144</sup>—not one that rapidly would become obsolete as mere terminology changed. Looking at contemporary usage, the framers often used “declare war” interchangeably with terms like “authorize or begin” war,<sup>145</sup> “authority to make war,”<sup>146</sup> and “determining on . . . war.”<sup>147</sup> Correctly inter-

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<sup>138</sup>The author uses this term to describe the legislature’s war powers function, which generally is two-fold: first, to decide whether to authorize military force or use some other instrument of foreign relations; and second, to predetermine parameters, if any, on the use of that force. These may be broadly categorized as policy decisions.

<sup>139</sup>2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.02 (5th ed. 1992). See also *Ogden v. Sanders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Chief Justice John Marshall summarizing four principles of constitutional construction that include elements of the “literal interpretation rule,” although he does not use this label.)

<sup>140</sup>1 STORY, *supra* note 94, § 400.

<sup>141</sup>See Reveley, *supra* note 85, at 89–90 (arguing that based on their knowledge of the great warfare theorists of Europe—Grotius, Pufendorf, Vattel, and Burlamaqui—framers and ratifiers knew that “war might be limited or general, that marque or reprisal were a means of waging limited hostilities, and that even major conflict generally began without prior declaration” in eighteenth century Europe). See also THE FEDERALIST No. 25, at 211 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (“[T]he ceremony of a formal denunciation of war has of late fallen in disuse.”).

<sup>142</sup>HENKIN, *supra* note 10, at 80–81 (stating that this view is “without foundation”).

<sup>143</sup>1 STORY, *supra* note 94, § 428; *Ogden*, 25 U.S. at 332.

<sup>144</sup>See *supra* notes 95–97 and accompanying text.

<sup>145</sup>1 FARRAND, *supra* note 86, 292 (quoting Alexander Hamilton’s proposal for the executive presented to the convention on June 18, 1787, where he uses both terms interchangeably).

<sup>146</sup>2 FARRAND, *supra* note 86, at 318 (quoting Charles Pinckney from a convention debate on August 17, 1787).

<sup>147</sup>Compare US .ART. OF CONFED. art. VI (using term “declaration of war”) with *id.* art. IX (using term “determining on . . . war” to describe same factual event).

puted, this first grant gives Congress the exclusive and plenary power to *authorize* war.<sup>148</sup> By implication, the President's war powers were subject to Congress's war powers.<sup>149</sup>

Some scholars have found the term "war" problematic because warfare has evolved so radically since 1787.<sup>150</sup> Use of the term "Cold War" would have left the framers baffled. Some scholars suggest that this grant only governs full-scale *uses* of force or "perfect" wars, to use the eighteenth century term.<sup>151</sup> These scholars imply or conclude that lesser uses of force, short of war, are solely or primarily within presidential control.<sup>152</sup> Once again, such a restrictive construction violates the rules of interpretation and ignores the framers' adaptable document objective. Moreover, in the framers' vernacular, "war" meant all "contest[s] between nations or states, carried on by force."<sup>153</sup> When read in conjunction with the next grant, the framers

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<sup>148</sup>See 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed., 1906) (expressing Madison's view in 1793 that it is necessary to carefully distinguish power that a Commander-in-Chief has "to conduct a war" from power to decide "whether a war ought to be commenced, continued, or concluded"). Cf. Donald King & Arthur Leavens, *Curbing the Dog & War: The War Powers Resolution*, 18 HARV. INT'L L.J. 55, 57-65 (1977). See generally Note, *War-Making Power*, 81 HARV. L. REV. 1771, 1772-74 (1968) (discussing difficulty in interpreting what an outdated concept means in today's context and concluding that "declare war" means "the power to initiate war").

<sup>149</sup>Thomas Jefferson implied this concept in his famous "Dog of War" quote. Though not a framer, his understanding was that the text of the Constitution took the decision for war from the executive—where the objectionable concept of prerogative would have placed it—and transferred it to the legislative branch. "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." Letter from Thomas Jefferson to James Madison (Sept. 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed., 1961).

<sup>150</sup>See Note, *supra* note 148, at 1774-75 (discussing what framers' term "war" means in a modern context and concluding that it should be defined in terms of the two rationales for originally placing "war" in Congress's control—war involves great risks to the nation in both economic and social terms, and acts of war may involve global consequences). See generally FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE* (1949); Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98 (1954).

<sup>151</sup>See Rostow, *supra* note 97, at 193-94 (interpreting "declare war" in terms of international law distinction that distinguishes general from limited wars).

<sup>152</sup>KEYNES, *supra* note 113, at 36-37. But see HENKIN, *supra* note 10, at 63-54. See *infra* notes 280-93 and accompanying text.

<sup>153</sup>In 1828, Noah Webster published the first comprehensive dictionary of the American language. It reflected American adaptations on the English language and was Webster's attempt to increase uniformity in the language by establishing standard definitions based on the highest customary usages of that time. Slater, *Preface* to NOAH WEBSTER, *AN AMERICAN DICTIONARY FOR THE ENGLISH LANGUAGE* (unnumbered) (Foundation for American Christian Education ed., Foundation for American Christian Education 1967) (1828). The definition of "war" which the framers were probably most familiar with does not mention a formal "declaration" of war, only authorization by the "sovereign power."

War—a contest between nations or states, carried on by force, either for defense, or for revenging insults and redressing wrongs, for the exten-

intent to assign Congress the power to authorize all uses of force, except in one instance, is evident.<sup>154</sup> The framers apparently understood that lesser uses of force could lead to “perfect war.”<sup>155</sup> Perhaps the framers anticipated the day when there would be no clear delineation between war and lesser uses of force.<sup>156</sup>

Discussion of the war powers often overlooks the next grant of power dealing with letters of marque and reprisal. Although Professor Henkin has commented that “[t]his power is dead,”<sup>157</sup> it is “dead” only in the sense that Congress no longer grants such letters. However, the grant still has interpretive value. The framers were familiar with these letters, which essentially authorized Americans to commit acts of war against the subjects of other nations.<sup>158</sup> Gov-

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sion of commerce or acquisition of territory, or for obtaining and establishing the superiority and dominion of one over the other. These objects are accomplished by the slaughter or capture of troops, and the capture and destruction of ships, towns and property. Among rude nations, war is often waged and carried on for plunder. As war is the contest of nations or states, it always implies that such contest is authorized by the monarch or the sovereign power in the nation. When war is commenced by attacking a nation in peace, it is called an offensive war, and such attack is aggressive. When war is undertaken to repel invasion or the attacks of an enemy, it is called defensive, and a defensive war is considered as justifiable. Happy would it be for mankind, if the prevalence of Christian principles might ultimately extinguish the spirit of war, if the ambition to be great, might yield to the ambition of being good.

2 AN AMERICAN DICTIONARY FOR THE ENGLISH LANGUAGE 110 (1828) *But see* Thomas and Thomas, *supra* note 54, at 43–46.

<sup>154</sup> The exception to this general grant allowed the President, as the Commander-in-Chief, to repel sudden invasions of the nation. *See infra* notes 168–70 and accompanying text.

<sup>155</sup> Reveley, *supra* note 85, at 89 & n.46.

<sup>156</sup> Cf. HENKIN, *supra* note 10, at 100 (stating that trying to delineate between “war and lesser uses of force is often elusive”—thus, the standard is not appropriate for modern day usage. *See generally* Harry W. Jones, *The President, Congress, and Foreign Relations*, 29 CAL. L. REV. 565, 679–80 (1941) (“short of war” is not an effective constitutional standard),

<sup>157</sup> HENKIN, *supra* note 10, at 318 n.2.

<sup>158</sup> *Marque* and *reprisal* were well known terms to the framers. According to a contemporary dictionary, the authorizations could apply to land warfare as well.

Reprisal—The seizure or taking of any thing from an enemy by way of retaliation or indemnification for something taken or detained by him. . . . “Letters of marque and reprisal”—a commission granted by the supreme authority of a state to a subject, empowering him to pass the frontier [marque,] that is, enter an enemy’s territories and capture the goods and persons of the enemy, in return for goods or persons by taken by him.

2 AN AMERICAN DICTIONARY FOR THE ENGLISH LANGUAGE 56 (1828).

*Marque*—(1) Letters of marque are letters of reprisal; a license or extraordinary commission granted by a sovereign of one state to his subjects, to make reprisals at sea on the subjects of another, under pretense of indemnification for injuries received. *Marque* is said to be from the same root as marches, limits, frontiers, and literally to denote a license to pass

ernments issued these letters primarily to ship captains who acted **as** official pirates for the state. This practice was how nations waged limited naval wars in the late **1700s**, and how they took reprisal in redress of national grievances.<sup>159</sup> Though the Articles of Confederation<sup>160</sup> addressed these letters, the Constitution's framers failed to mention them in their first working draft. On August 18, 1787, either Charles Pinckney or Elbridge Gerry (record unclear) finally proposed adding letters of marque and reprisal, because these letters were different than the "power of **war**."<sup>161</sup> The convention record does not reflect any dissent over granting this lesser war power to Congress. Apparently the framers agreed that the nation's legislature should control these lesser uses of force.<sup>162</sup>

The third grant of power, dealing with the capture of foreign property, relates to the second grant. The framers gave Congress the power to formulate rules for military engagements and to provide for the confiscation of foreign property (especially ships) **as** the prizes of limited warfare.<sup>163</sup> Consistent with the previous grants, the framers assigned Congress control over the nature of the nation's military operations.

Federal convention discussions and debates about the war powers were few and relatively uneventful. The only significant

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the limits of a jurisdiction on land, for the purpose of obtaining satisfaction for theft by seizing the property of the subjects of a foreign nation.

(2) A ship commissioned for making reprisal.

2 AN AMERICAN DICTIONARY FOR THE ENGLISH LANGUAGE 12 (1828).

<sup>159</sup> See Biden & Ritch, *supra* note 32, at 376 (discussing significant Supreme Court cases resulting from execution of letters of marque, which found that all wars, both perfect (formal/full-scale) and imperfect (limited), were embraced within the constitutional definition of "war"). See also Richard M. Pious, *Presidential War Powers, the War Powers Resolution, and the Persian Gulf*, in THE CONSTITUTION AND THE AMERICAN PRESIDENCY 195, 198 (Martin L. Fausold et al. eds., 1991).

<sup>160</sup> See U.S. ART. OF CONFED. arts. VI, IX.

<sup>161</sup> 1 FARRAND, *supra* note 86, at 322, 326.

<sup>162</sup> Compare THE FEDERALIST No. 44, at 318 (James Madison) (Bedamin F. Wright ed., 1961) (Under Articles of Confederation states had limited power to issue letters of marque and reprisal; to justify granting this power solely to the national Congress Madison pointed to "the advantages of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible."); with U.S. CONST. art. I, § 10 (prohibiting states from issuing letters of marque or reprisal). Madison felt that national issuance of these letters was important, because the nation would be held internationally responsible for any uses of force pursuant to them. These practices had foreign relations implications, and the national government, specifically Congress, was to control these practices.

<sup>163</sup> KEYNES, *supra* note 113, at 37 (mentioning that these rules pertained to both public and private ships). To some extent, these rules of capture operated **as** rules of engagement for public ships. See also Pious, *supra* note 169, at 197 (comparing this third grant of power to a modern day antiterrorist capability).

moment with respect to Congress's war powers occurred on August 17, 1787, when the wording of the first draft was changed from "make war" to "declare war."<sup>164</sup>

The general convention had recessed on July 26, 1787, to allow the Committee of Detail<sup>165</sup> to prepare a first draft of the Constitution. On August 6, 1787, John Rutledge presented this first draft, giving Congress the power "to make war."<sup>166</sup> The delegates began discussing the draft clause-by-clause, and they did not reach the war clause until August 17. However, the record at this critical point is unsatisfactory. Two framers presented alternative proposals, which the delegates rejected.<sup>167</sup> James Madison and Elbridge Gerry moved "to insert declare, striking out make war; leaving to the Executive the power to repel sudden attacks."<sup>168</sup> Toward the end of the ensuing discussion, delegate Rufus King stated that "'make' war might be understood to 'conduct' it, which was an Executive function."<sup>169</sup> The records contain no further discussion on this point. The effect of King's stray comment is uncertain because the two available records diverge. King's statement may have changed one inconsequential vote or several votes, resulting in passage of Madison's motion after it had failed initially. Ultimately, the motion passed at least partly or wholly for reasons stated by Madison and Gerry, and partly or wholly for the reason stated by King. Either way, King's statement comports with the framers' view of the President's war powers. Despite the poor record, one may fairly conclude that this celebrated change reflects the framers' intent to empower the President to repel sud-

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<sup>164</sup> 2 FARRAND, *supra* note 86, at 318–20 (presenting all available accounts of this one and only debate/discussion of the war powers; James McHenry's brief note is not helpful; Madison's version is the most helpful, but it conflicts with Jackson's version). *See supra* note 87.

<sup>165</sup> The members of the Committee of Detail were John Rutledge (Chairman), Edmund Randolph, James Wilson, Nathaniel Gorham, and Oliver Ellsworth. *See* C. EDWARD QUINN, *THE SIGNERS OF THE CONSTITUTION OF THE UNITED STATES* 108–09 (1987) (discussing organization of the federal convention and giving a brief biographical sketch on each of the 39 signers).

<sup>166</sup> 2 Farrand, *supra* note 86, at 181–82.

<sup>167</sup> 2 *Id.* at 318 (discussing how Charles Pinckney thought that vesting this power in the Senate would be better because the Senate would have the expertise in foreign affairs, would already have the power to make peace by treaty [this is implied], and the House would be too slow and too large for such deliberations; also discussing how Pierce Butler made the only recorded proposal that power to make war be placed with the President, because the Senate suffered from same institutional shortcomings as the House). After some unrelated discussions, the record reflects an apparently misplaced entry "Mr. [Elbridge] Gerry never expected to hear in a republic a motion to empower the Executive also to declare war," after which the record returns to an unrelated discussion. 2 *Id.* at 318. This exemplifies problems with interpreting the record. *See supra* note 88.

<sup>168</sup> 2 FARRAND, *supra* note 86 at 318.

<sup>169</sup> 2 *Id.* at 319 (appearing only in Madison's record as a margin entry to final vote).

den enemy attacks<sup>170</sup> and to conduct military operations, the latter being embodied in the Commander-in-Chief clause.

From the three express grants and the debate on August 17, 1787, one may draw the conclusion that the framers entrusted Congress with the decisional war powers—the power to authorize any use of force and to set limits on the nature of that use, when deemed appropriate. Congress was not to control military operations once they were authorized. Finally, a very narrow exception allowed the Commander-in-Chief to forcibly repel sudden attacks without congressional authorization.

(ii) *The President: The Operational*<sup>171</sup> War Powers.—The Constitution expressly assigns power to our President as the Commander-in-Chief.<sup>172</sup> What did the framers mean by the Commander-in-Chief clause? The convention's record reveals that this was a relatively uncontroversial decision. Some scholars have called this more of a title than a power. Perhaps this is due to the anemic construction given to this term during the first seventy years under the Constitution.<sup>173</sup> But such a construction is inconsistent with the ideas expressed at the convention; with the ideas and lessons gleaned from historical antecedents;<sup>174</sup> and with the framers' use of the term.<sup>175</sup>

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<sup>170</sup> 2 *Id.* (Madison's account reflects initial passage of the Madison/Gerry motion by a 7-2 vote—after King's comment, the motion passed by an even greater margin—8-1. Jackson's account reflects initial defeat of the motion by a 5-4 vote—then apparently after King's comment, however, the motion passed by an 8-1 vote). See also HENKIN, *supra* note 10, at 52 (stating “the power of the President to use the troops and do anything else necessary to repel invasion is beyond question”); *id.* at 305 n.38 (citing authority—custom, early statutory recognition, and early judicial interpretation—all consistent with this view). The difficult issues arise in the area of the President's constitutional authority for conducting military operations preemptively when he or she anticipates imminent invasion. *Id.* at 52.

<sup>171</sup> The author uses this term to describe the executive's war powers function—generally broad discretion to use military force to obtain the stated objectives within the parameters set by the legislature—broadly characterized as operational decisions.

<sup>172</sup> U.S. CONST. art. II, §2, cl. 1.

<sup>173</sup> See CORWIN, *supra* note 33, at 228-29 (proposing that Abraham Lincoln was first president to construe the Commander-in-Chief clause broadly and to use it aggressively); see also HENKIN, *supra* note 10, at 50-51. See generally CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (R. Longaker rev. ed., 1976) (presenting an historical analysis of the powers).

<sup>174</sup> See *supra* notes 98-132 and accompanying text.

<sup>175</sup> Cooper, *supra* note 120, at 174-75 (discussing framers' possible understanding of Commander-in-Chief clause based on their experiences in the states and in drafting such provisions for state constitutions). The definition of terms closely related to Commander-in-Chief, which the framers probably knew and used, show that the Commander-in-Chief is clearly involved in the operational aspects only.

Commander—a chief; one who has supreme authority; a leader; the chief officer of an army, or of any division of it. The term may also be applied to the admiral of a fleet, or of a squadron, or to any supreme officer; as

During the early phases of the federal convention, several framers submitted proposals that either designated the executive as Commander-in-Chief or gave him operational control over war. Notably, the Virginia Plan, which evolved into our Constitution, did not initially address the executive's war powers.<sup>176</sup> Hamilton, who consistently advocated a strong executive,<sup>177</sup> proposed that the Senate "have the sole power of declaring war," and that the executive "have direction of the war when authorized or begun."<sup>178</sup> Charles Pinckney proposed a similar arrangement.<sup>179</sup> In the New Jersey Plan, William Patterson proposed a "multiple executive"<sup>180</sup> to "direct all military operations."<sup>181</sup> Patterson's latter proposal triggered some debate. Neither Pierce Butler nor Elbridge Gerry believed that a multiple executive could effectively control military operations, implicitly recognizing the great need for unity of command, secrecy, speed, and decisiveness in such operations.<sup>182</sup>

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the commander of the land or of the naval force; the commander of a ship.

1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 41 (1828).

Chief—a commander; particularly a military commander; the person who heads an army; equivalent to the modern terms, commander or general in chief, captain general, or generalissimo.

1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 36 (1828).

<sup>176</sup>The initial Virginia Plan proposed that the executive was to "enjoy the Executive rights vested in Congress by the Confederation." 1 FARRAND, *supra* note 86, at 21. Several delegates understood the implications of this vague statement and expressed fear that this might assign to the new executive the powers of "war and peace." 1 *id.* at 64–65 (expressing fears of Charles Pinckney and John Rutledge). The amended proposal dropped the vague grant of power, and the revisors substituted only a few express powers; the revisors did not address war and peace. 1 *id.* at 230.

<sup>177</sup>Generally, Hamilton's vision for a strong national government and a powerful executive branch was unacceptable to the framers and the public. See Reveley, *supra* note 85, at 99–100. The forward-looking Hamilton may have envisioned the future role of our nation in world affairs and the need to project force. See generally THE FEDERALIST NOS. 11, 24, at 208 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>178</sup>1 FARRAND, *supra* note 86, at 292; see also 3 *id.* at 622, 626 (presenting Hamilton's draft of the whole Constitution, which never was formally presented at the convention, but which was given to Madison near the close); see also THE FEDERALIST No. 74 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (presenting, perhaps disingenuously, Hamilton's concept for the Commander-in-Chief). In contrast, Robert Yates' version stated that Hamilton's proposal gave the executive "the sole discretion of all military operations." 1 FARRAND, *supra* note 86, at 300.

<sup>179</sup>The Charles Pinckney proposal was referred to the Committee of the Whole, but never debated. He also designated the executive as "Commander in Chief of the army & navy" without further explanation. Pinckney gave the Senate the power to "declare War." 1 FARRAND, *supra* note 86, at 23; 3 *id.* at 699–600.

<sup>180</sup>Not all proposals recommended a unitary executive. The New Jersey Plan left the exact number of executives open to determination by the convention. 1 *id.* at 244.

<sup>181</sup>1 *Id.*

<sup>182</sup>1 *Id.* at 88–89, 97.

The Commander-in-Chief clause originated with the Committee of Detail. With respect to the war powers, the Committee of the Whole<sup>183</sup> did not give any specific guidance to the Committee of Detail.<sup>184</sup> Based on the source documents used by this latter committee,<sup>185</sup> it appears that the New Jersey Plan and Pinckney's proposals generated the final Commander-in-Chief clause.

John Randolph prepared the earliest outline containing a Commander-in-Chief clause. It read: "[the executive powers shall be] to command and superintend the militia." John Rutledge altered this outline and added the Commander-in-Chief clause that essentially appears in our Constitution.<sup>186</sup> Rutledge previously had expressed concern over vesting the powers of "war and peace" in the executive.<sup>187</sup> Unless he changed his mind, Rutledge certainly did not equate the powers of a Commander-in-Chief with the decisional war powers.

The Committee of Detail eventually presented its draft containing Rutledge's Commander-in-Chief clause,<sup>188</sup> and the Committee of the Whole adopted this clause with little debate.<sup>189</sup> This is surprising, because nearly every other proposed executive power provoked controversy. Logical explanations are that the framers commonly understood the Commander-in-Chief power to exclude Congress's

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<sup>183</sup>The "Committee of the Whole" refers to the entire membership of the convention when operating as a deliberative, decision-making body. QUINN, *supra* note 165, at 108.

<sup>184</sup>2 FARRAND, *supra* note 86, at 69-70 (suggested further guidance, but apparently decided that this was for the Committee of Detail to determine); 2 *id.* at 132 (reflecting no mention of war powers in "resolutions" or guidance from Committee of the Whole). For a listing of the members on the Committee of Detail see *supra* note 165.

<sup>185</sup>2 FARRAND, *supra* note 86, at 157-58 (showing that relevant portions of the New Jersey Plan and Pinckney's proposal found with other Committee of Detail working documents).

<sup>186</sup>2 *Id.* at 137 n.6 (explaining Farrand's system of marking); 2 *id.* at 145 (displaying Randolph's amended outline).

<sup>187</sup>1 *Id.* at 65.

<sup>188</sup>2 *Id.* at 185.

<sup>189</sup>2 *Id.* at 422 (reflecting Jackson's version); 2 *id.* at 426 (reflecting Madison's version, which notes that after some discussion the draft was changed to make the President the Commander-in-Chief of the states' militias only when called into federal service by Congress). The major points of controversy focused on a fear of "standing armies" and federal use of the states' militias. Hamilton spent the better part of four *Federalist Papers* trying to assuage the public's and states' fears. See generally THE FEDERALIST Nos. 25, 26, 28, 29 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). If length of treatment in *The Federalist Papers* is any indication of the controversy surrounding the issue, the war power model presented little difficulty. Hamilton addresses the Commander-in-Chief clause in the first paragraph of one paper, see *id.* No. 74, at 473, and in part of a paragraph in another paper, see *id.* No. 69, at 446. Hamilton mentions the Commander-in-Chief clause only briefly in three other papers. See *id.* Nos. 70, 72, 75.

weightier decisional war powers,<sup>190</sup> and that a legislative body **was** incapable of controlling military operations.

Given the genesis of the Commander-in-Chief clause, nothing suggests that it assigns anything but the operational war powers to the President. The framers simply meant for the Commander-in-Chief to furnish civilian leadership for the military and to control operations,<sup>191</sup> thereby exploiting the institutional advantages that only a unitary executive could provide.

*(b) Logical Consistency Between the Express Grants.*—The framers obviously were learned and sophisticated. They understood their world, but lived in a radically different era. The framers' apparent conceptual model was difficult to apply almost immediately.<sup>192</sup> Moreover, the framers never directly addressed how their war powers partnership was to operate. Is it possible that, in their haste to address more divisive issues, they simply assigned the four grants of power and hoped for the best? **All** of the war power grants considered together reveal an internally consistent and logical plan—if not actual genius.

First, the model for the war powers comports with the framers' intellectual foundations. They divided the powers between two coordinate branches to prevent accumulation of power.<sup>193</sup> They formulated a somewhat unique and experimental<sup>194</sup> check by dividing

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<sup>190</sup>*Id.* No. 26, 17 215 (Alexander Hamilton) (Bedamin F. Wright ed., 1961) (arguing that based on British experience, placing existence and control of a standing army in hands of Parliament was a sufficient safeguard to liberties).

<sup>191</sup>*See* MAY, *supra* note 112, at 3-19. Apparently several framers and ratifiers were afraid that the executive as Commander-in-Chief would not just control military operations, but would physically command the operations. A commonly debated issue, especially at the states' ratifying conventions, was whether to propose an amendment to the Constitution which would prevent the President from personally commanding the troops in the field. *See* 1 FARRAND, *supra* note 86, at 244; 3 *id.* at 217-18; Reveley, *supra* note 85, at 113. **This** concept is so ridiculous to modern commentators that the significance of these debates is not fully appreciated.

<sup>192</sup>*See infra* notes 261-79 and accompanying text.

<sup>193</sup>THE FEDERALIST No. 47, at 336 (James Madison) (Bedamin F. Wright ed., 1961).

<sup>194</sup>*Id.* No. 48, at 343, 345 (James Madison) (Benjamin F. Wright ed., 1961). The aspect of the system which makes it a unique experiment is that the check was primarily unilateral. The legislative branch effectively could check the executive, but the converse was not true. Under the classic theory of checks and balances, each separate branch must be able to effectively check the other and thereby protect its powers. *Id.* No. 51, at 366. But even Madison recognized that perfect bilateralism in the system was impossible, since "[i]n a republican government, the legislative authority necessarily predominates." *Id.* No. 61 at 356.

Although the war power model apparently received little criticism, the treaty-making model, which conceptually was similar, must have been controversial. In one Federalist Paper, Hamilton defends against the charge that treaty-making under the new government violates the separation of powers maxim. Hamilton refers to the

the war powers along functional lines—decisional and operational. To exercise the power, the two political branches would have to cooperate. The Congress could authorize war and the Executive would conduct war operations. This division of responsibility advanced the framers' goal of resurrecting balanced government.

Second, the model for the war powers fits the framers' desire to match institutional strengths with specific functions.<sup>195</sup> By nature, the war power could be bifurcated along functional lines; the framers perceived the need for a policy level decision-maker and a responsive commander. From historical antecedents, the framers realized that the legislative branch would be a safe repository for decision-making of such great national importance,<sup>196</sup> and that the executive branch would be the ideal executor. Thus, the framers achieved their goal of effective war powers, at least from a functional perspective.

Third, the model for the war powers was politically acceptable to the public, and it increased the Constitution's chances of ratifica-

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binding of the executive to the Senate as an "intermixture of powers." He argues that the peculiar nature of the treaty power makes this mixing proper. Essentially the functions have been divided and assigned to the branch with the relative institutional advantage: the executive possesses the qualities to be "the most fit agent in those transactions"; and Senate participation is merited because of the "vast importance of the trust, and the operation of treaties as laws." Hamilton then goes on to discuss how the treaty-making power in either the executive alone, the Senate alone, or the House, would be dangerous or institutionally less satisfactory. He calls the treaty-makers "a distinct department." *Id.* No. 75, at 476-78 (Alexander Hamilton). Nearly the same analysis could have been presented for the war power model, but apparently such a defense was not necessary.

<sup>195</sup>To the extent that the framers were as knowledgeable as Hamilton, they would have understood the specific strengths and weaknesses of the legislative and executive branches. *See generally id.* No. 70, at 451-52, 454.

<sup>196</sup>The framers also granted the legislative branch all of the related war powers, such as raising and supporting an army and navy, issuing governing rules, calling forth the militia (originally considered a more important source of military power than a standing army), and managing the militia. The President received only one related war power: command of the militia when federalized by congressional decision. As John Jay explained, consolidation into one large army under unified command was the more efficient method. *See id.* No. 4, at 103 (John Jay) (Benjamin F. Wright ed., 1961). *See also* KEYNES, *supra* note 113, at 45 (arguing that vesting related war powers, especially power to make rules governing the armed forces, was yet another means of distinguishing executive from a British monarch with prerogative). *See also* 2 STORY, *supra* note 94, § 1171 (stating that Congress was slow moving and deliberate, thereby making it difficult to commence war which was proper in a republic; Congress more closely represented the population).

This was consistent with the framers methodology. These related powers functionally belonged to the legislative branch, because they all involved decision-making. Surprisingly, the training and appointment of officers for the militia, which would have naturally been executive in nature, was left expressly to the states. U.S. CONST. art. I, § 8, cl. 16. This is in accord with the pattern to derogate the executive power whenever possible. In many respects the militia was meant to be the private army of the states, which had retained some undefined quantum of sovereignty. *See infra* Appendix A (chart, "Express and Ancillary Grants of Power").

tion. The framers were pragmatists; they knew that the most efficient government they could create would probably be unacceptable.<sup>197</sup> Legislative domination of the executive by making the latter subject to the former's decisional power was necessary to secure ratification.

Finally, the model for the war powers divided power along functional lines. The power was not originally concurrent or overlapping,<sup>198</sup> making competition for power each branch's destiny. Each branch had an assigned primary function within the partnership. At the fringes there would be overlap, but not enough to generate interbranch warfare. Thus, the framers did not originally send out "an invitation to struggle,"<sup>199</sup> but rather an invitation to cooperate in solving America's national security problems.

(c) *Consistency Between the War Powers Grants and the Constitution as a Whole.*—Considering the Constitution as a whole document is instructive, because patterns of design and structure emerge. With respect to interpreting text susceptible to more than one meaning, Professor Story provides this guidance on construction: "Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with . . . the scope and design of the instrument."<sup>200</sup>

The framers' conceptual model for the war powers is totally consistent with overall patterns of the Constitution's design and

<sup>197</sup> *E.g.*, HENKIN, *supra* note 10, at 33; THE FEDERALIST NO. 77, at 489 (Alexander Hamilton) (Benjamin F. Wright ed., (1961) (stating, "the executive department, which, I have endeavored to show combines, as far as republican principles will admit, all the requisites to energy"). Strict efficiency would have mandated giving the bulk of an undivided war power to the executive. This was unacceptable under the framers' set of values, so it was not done. Efficiency and effectiveness in government intentionally were subordinated to the preservation of liberties. See also 1 FARRAND, *supra* note 86, at 125 (Pierce Butler stating at the convention, "We must follow the example of Solon who gave the Athenians not the best Govt. he could devise, but the best they wd. receive").

<sup>198</sup> One recognized exception is the President's power to repel sudden invasion. In this limited area the President exercises both the decisional and operational war power, at least until military stabilization of the situation. See *supra* notes 168-70 and accompanying text. See *infra* note 249 and accompanying text.

<sup>199</sup> See *supra* note 33. 2 STORY, *supra* note 94, § 1171 (referencing power to declare war, Story states "cooperation of all the branches . . . [is] to be required in this highest act of legislation.").

<sup>200</sup> 1 STORY, *supra* note 94, § 405. See also *id.* § 455 ("But the most important rule, in cases of this nature, is that a constitution of government does not, and cannot, from its nature, depend in any great degree on mere verbal criticism, or on the import of single words[] . . . but unless it stands well with the context and subject-matter, it must yield . . . it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition, which best harmonizes with its design, its objects, and its general Structure.").

structure. First, legislative predominance throughout national government was a conceptual cornerstone.<sup>201</sup> After carefully analyzing the powers of the executive nearly clause-by-clause,<sup>202</sup> Hamilton concluded by stating:

In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan [the proposed constitution], be subjected to the control of a branch of the legislative body.<sup>203</sup>

Madison considered the legislative powers expansive and he warned: "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precaution."<sup>204</sup> Assigning the decisional war powers to Congress as a whole, not just to the Senate,<sup>205</sup> was consistent with this fundamental design.

Second, the war powers model is consistent with the general power structure running throughout the entire Constitution. Some scholars conclude that the distribution of power between the political branches in foreign affairs is fundamentally different than in domestic affairs.<sup>206</sup> This is true only if the Constitution is analyzed in terms of what it has become. The original structure for the exercise of all constitutional power was the same. The legislative function was primarily decisional—to contemplate, deliberate, and create policies and laws, and to give "advice" to the executive in the creation of treaties.<sup>207</sup> The executive function was pri-

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<sup>201</sup> Legislative predominance was not just a concept, but was reality during the earliest administrations. Cruden, *supra* note 10, at 45-46.

<sup>202</sup> See The Federalist Nos. 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>203</sup> *Id.* No. 77, at 489. Hamilton understood the framers' original conceptual model for the war powers and its implications for national security. Given his philosophy, he was less than optimistic about the experiment. In the context of defending the national government's power to tax in order to provide for the "common defence," he stated: "Admitting that we ought to try the novel and absurd experiment in politics, of tying up the hands of government from offensive war, founded on reasons of state; yet, certainly, we ought not to disable it from guarding the community against the ambition or enmity of other nations." *Id.* No. 34, at 260.

<sup>204</sup> *Id.* THE FEDERALIST No. 48, at 344 (James Madison) (Benjamin F. Wright ed., 1961). See also HENKIN, *supra* note 10, at 33-34.

<sup>205</sup> See *supra* notes 167, 178 (referencing Hamilton's and Pinckney's proposals). See *infra* Appendix B (chart, "General Power Structure").

<sup>206</sup> E.g., HENKIN, *supra* note 10, at 31-33; United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 315-18 (1936) (declaring Supreme Court's view [at least Justice George Sutherland's view] that foreign affairs are a discrete constitutional category).

<sup>207</sup> Apparently President George Washington interpreted the treaty "advice and consent" phrase as empowering the Senate to provide considerable inputs to pro-

marily<sup>208</sup> operational—to carry out and to enforce<sup>209</sup> the legislative decisions, to conclude treaties<sup>210</sup> for Senate approval, and to control uses of force. And the judicial function was to apply the laws and treaties to specific cases, and later when the concept of judicial review crystallized,<sup>211</sup> to determine the constitutionality of governmental acts and enactments.

The original war powers model was not an anomaly. The framers' model reflected the same general power structure embodied in the Constitution. Design of the war powers model is strikingly similar to the only other significant foreign affairs power addressed in the Constitution—the treaty power. Both powers were institutionally subdivided along functional lines.

*(d) The Intrinsics: Conclusions.*—The intrinsic materials

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posed treaties before and during negotiations, with the actual negotiations being left to the executive and his agents. In 1789, he tried to obtain senatorial guidance for his negotiators concerning a proposed treaty with Southern Indian tribes. He went to the Senate with his Superintendent of War, Henry Knox, in tow. Open and frank discussion was impossible with Washington present, and the proposals were too complex even for the Senate to take up without preparation. The Senate did its best to debate his proposals, but the action eventually was postponed. Washington got angry, and it was an awkward situation for all involved. Thus, Washington's first attempt at personal "advice and consent" ended in failure and began a series of unfortunate precedents. *See* FORREST McDONALD, *THE PRESIDENCY OF GEORGE WASHINGTON 27–28 (1974)*; *see also* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 227 (1989) (Washington never again attempted personal "advice and consent," but he continued to seek senatorial input to treaties, as opposed to mere approval, in writing); *see also* Monroe Leigh, *A Modest Proposal For Moderating the War Powers Controversy* (March 30, 1988) (unpublished manuscript and basis for address at conference sponsored by the ABA's Standing Committee on Law and National Security, on file with the George Mason Law School) (describing final episode in Washington's attempt to receive senatorial "advice" in 1794; Washington sought the Senate's advice before dispatching John Jay, the Senate refused to advise in advance, and Washington vowed he would never again seek Senate advice in advance). *See generally* THE FEDERALIST No. 64 (John Jay) (Benjamin F. Wright ed., 1961); Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End Is Achieved, 83 AM. J. INT'L L. 718 (1989). Modernly, presidents are more likely to present treaties as a *fait accompli* for Senate concurrence.

<sup>208</sup>The executive also could initiate policies and laws by way of proposal. U.S. CONST. art. II, § 3, cl. 1. Because of special access to information through his diplomatic corps, the President also was in a position to initiate and recommend the negotiation of treaties.

<sup>209</sup>U.S. CONST. art. II, § 3 ("he shall take Care that the Laws [which included approved treaties] be faithfully executed").

<sup>210</sup>Unquestionably the treaty-making powers followed a different pattern than normal legislation. *See supra* note 194. This uniqueness has led scholars to call the treaty-makers the "fourth department [branch]." *See* WRIGHT, *supra* note 81, §§ 74–85. The treaty power, like the war power, was functionally subdivided and assigned to the institutionally most capable branch, or partial branch, subject to the constraints of republican principles. *See also* THE FEDERALIST No. 64, at 422–23 (John Jay) (Benjamin F. Wright ed., 1961) (Jay explaining how the treaty-making process took advantage of the institutional strengths of both partners—the Senate and the President).

<sup>211</sup>*See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (opinion by Chief Justice John Marshall establishing the concept of "judicial review").

are quite limited, but sufficient to construct a general conceptual model for the war powers. Intensive analysis of the text, what it meant to the framers, and how the framers arrived at the text lead to the following conclusion: the framers divided the war powers by assigning to Congress the primary decisional aspects and to the President the subordinate, yet no less important, operational aspects. Analyzing all the grants together, the model represents a logical, internally consistent approach. Finally, the model is consistent with overall patterns that run through the Constitution as a whole.

**4. More Extrinsic: The Ratification Process Materials.** —The subsequent discussion returns to extrinsic materials, looking beyond the actual text to discover meaning. Although the intrinsic materials are primary, the first extrinsics encountered, *The Federalist Papers*, are particularly valuable in discovering the “intent of the framers.”

(a) *The Federalist Papers.* —The authors of *The Federalist Papers* wrote for the express purpose of favorably influencing the ratification process in New York; therefore, these papers technically are ratification process materials.<sup>212</sup> Assessing the impact of this work on the ratification process is speculative.<sup>213</sup> The degree to which these commentators<sup>214</sup> reflected the common understanding of the framers, the ratifiers, the public, or anyone else cannot be determined.<sup>215</sup> However, this work represents an actual commentary on the text. It reflects some of the thought processes that went into drafting, and it defends the product from erroneous interpretations. In these respects, the work is of singular importance to textual interpretation.

Assessing the interpretive value of *The Federalist Papers* is somewhat problematic. The authors wrote to “sell” the Constitution

<sup>212</sup>Reveley, *supra* note 85, at 86, 126 (explaining that throughout ratification process newspapers and circulating pamphlets continuously interpreted text of proposed Constitution and presented arguments; *The Federalist Papers* represent the most substantial and influential efforts, and they also more closely reflect the framers’ understandings than other contemporary works). See generally ALEXANDER HAMILTON ET AL., *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788* (Paul L. Ford ed., 1892) (presenting a collection of other ratification pamphlets and articles).

<sup>213</sup>Reveley, *supra* note 85, at 86 & n.35, 126 n.178 (referencing additional materials concerning actual impact of this effort).

<sup>214</sup>There are 85 essays. Approximately 51 were written by Alexander Hamilton, who attended more than half of the convention; 29 were written by James Madison, who attended the entire convention; and 5 were written by John Jay, who was an experienced statesman though not a convention delegate. Benjamin F. Wright, *Introduction* to ALEXANDER HAMILTON ET AL., *THE FEDERALIST* 7–10 (Benjamin F. Wright ed., 1961) (discussing additional problems with determining exact authorship of these papers).

<sup>215</sup>*Id.* at 77.

to the ratifiers of New York, a key state.<sup>216</sup> Hamilton, who wrote the bulk of these papers, was a New Yorker who strongly supported ratification. He believed in a strong national government with a relatively powerful unitary executive, an unpalatable view for many New Yorkers. Thus, Hamilton had sufficient incentive to “tone down” potentially unacceptable views, and may have disingenuously restrained his insights,<sup>217</sup> thereby diminishing the interpretive value of the work.

Another problem concerns the scope and depth of the papers. The authors address only the most serious concerns of the public, so coverage of text is not comprehensive. Most of *The Federalist Papers* that deal with the “common defence” or war powers address the fear of “standing armies” in peacetime, the aversion to creating a national military, and the abiding suspicion of allowing national control over the states’ militias.<sup>218</sup> Furthermore, the detail of the discussion is not uniform throughout.

Because the public generally feared a unitary executive, Hamilton mentioned the President’s role as Commander-in-Chief five times.<sup>219</sup> In every instance the discussion was consistent with the conceptual model—the President would wield the subordinate operational war powers.

Discussion of Congress’s power to “declare war” was virtually nonexistent.<sup>220</sup> The most helpful exposition appeared within the

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<sup>216</sup> *Id.* at 11. This was an uphill struggle, because the New York delegates officially left the Philadelphia convention (Hamilton later returned on his own) and allied themselves with New York’s popular Governor Clinton to oppose the proposed draft. Almost immediately, the writing campaign against ratification began. When the New York ratification convention finally met on June 17, 1788, the vote was 19–46 against ratification. *Id.* at 1–4.

<sup>217</sup> At the convention, Hamilton’s ideas routinely were too radical for the other delegates, but in his *Federalist Papers* he presents a much more palatable interpretation of the text. This may explain why Hamilton “appears” to change his philosophy on, and interpretation of, the Constitution, especially as a member of Washington’s cabinet and in the famous Pacificus-Helvidius exchange. HENKIN, *supra* note 10, at 41 (unnumbered footnote), 43; see also *id.* at 304, n.34 (where Hamilton appears to change his views on the scope of the Commander-in-Chief clause); see also JOHN Q. ADAMS, EULOGY ON JAMES MADISON 46 (1836) (noting that during the Pacificus-Helvidius exchanges, Madison’s most forceful arguments were filled with quotations from Hamilton’s works in *The Federalist Papers*).

<sup>218</sup> *E.g.*, THE FEDERALIST Nos. 24, 25, 26, 27, 28, 29 (Alexander Hamilton) (Benjamin E Wright ed., 1961).

<sup>219</sup> Hamilton devotes an entire paragraph or a good portion of a paragraph to the Commander-in-Chief twice; the other three discussions are very brief. See *id.* Nos. 69, 70, 72, 74, 75. See Reveley, *supra* note 85, at 128–30, 129 n.190 (quoting all Commander-in-Chief discussions).

<sup>220</sup> See THE FEDERALIST No. 41 (James Madison) (Benjamin F. Wright ed., 1961). In this paper Madison concludes that the power to declare war is obviously necessary. Apparently there was little public controversy over this power. In Hamilton’s defense

context of Madison's attempt to allay fears of the new government's power. At one point Madison implies that the powers of "war and peace" lie with Congress, just as under the Articles of Confederation.<sup>221</sup> This very brief, ambiguous discussion was consistent with the conceptual model—Congress would wield the primary decisional war powers.

*The Federalist Papers* provides unmatched insight into the minds of two key framers and the society in which they lived and wrote. As a comprehensive commentary on the meaning of the Constitution, the papers are hopelessly deficient. The limited treatment of the war powers generally confirms, however, the war powers model previously derived.

(b) *The State Ratification Materials*.—Ratification was a singularly important chapter in the history of our Constitution. As an extrinsic source of textual meaning, Madison may have overstated the value of the ratification materials when he said: "If we were to look . . . for the meaning . . . beyond the face of the instrument, we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified it."<sup>222</sup> Madison was theoretically correct. The ratifiers' understanding of the text and the meaning they attached to the document provide the true original meaning of our Constitution. Only the ratifiers could have converted lifeless words into a living "supreme law" of the land.

Unfortunately, discovering the ratifiers common understanding of the war powers is impossible. With respect to the war powers, the ratifiers simply adopted the framers' work. At best these ratification materials provide a gloss to the text. Additionally, they provide a broader and deeper view of the society that gave life to our Constitution, which aids in any attempt to interpret the Constitution.<sup>223</sup>

Even a cursory review of the ratification materials reveals their shortcomings. The records from the various state ratification proceedings vary considerably in length and quality, and some are nearly useless.<sup>224</sup> Even assuming that each of the states discussed or

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of a national "standing" Army, he argues that the people need not fear such an army because "the whole power of the proposed government is to be in the hands of the representative of the people." *THE FEDERALIST* No. 28, at 224 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>221</sup> See *THE FEDERALIST* No. 45, at 329 (James Madison) (Benjamin F. Wright ed., 1961) (Madison stating that power under the proposed Constitution is equivalent to power of Congress under old Articles of Confederation).

<sup>222</sup> CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 794 (1928).

<sup>223</sup> See generally Reveley, *supra* note 85, at 124–43 (presenting a detailed analysis of ratifiers' treatment of war and treaty powers).

<sup>224</sup> See 2–4 ELLIOT, *supra* note 85, *passim*. The lengths of these state records range from the 663 page, highly detailed account from Virginia, to the 10 page,

debated the same portions of text, the differences in the quality of the records makes it impossible to discover the meaning that each state ultimately gave to the text. In addition, that a common understanding existed between the hundreds of ratifiers<sup>225</sup> who met at different times in different places is unlikely. If there was a common understanding, it is lost to time.

Based on the extant record, the ratifiers' treatment of the war powers was spotty and shallow. There was little debate over the proper allocation of this power between the two political branches. The issue was apparently not very controversial.<sup>226</sup> Discussion of the framers' substitution of "declare war" for "make war" at Philadelphia does not appear in any state record.<sup>227</sup> A few states wanted to require a two-thirds vote for a declaration of war. A few others expressed concern over designating one man as Commander-in-Chief, and the possibility of the President actually commanding in the field. The real controversy in nearly every state surrounded the power to keep a national "standing army" in peacetime. Generally, the ratifiers debated issues of no modern concern. Conversely, modern issues were not controversial to the ratifiers.

One debate appears sufficiently often, however, to merit mention. The debate concerns the traditional British maxim requiring separation of the power of the "purse" from the power of the "sword." This maxim was widely known, and three records reflect debate.<sup>228</sup> The maxim was not as well understood as it was known, because in two debates a speaker had to explain the "true" meaning of the maxim. Apparently, the "true" meaning was that within a government, different branches (or officials) ought to possess the

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"fragment of facts" account from Maryland. The records differ immensely in quality. Some are so fragmented and disjointed that the meaning is unclear at best. Some of the records are so sparse that they do not make sense. Some of the relevant debates do not come to any closure; therefore, one is left with several of the ratifiers' views on a subject, an argument, and nothing further. See 3 *id.* at 496-98 (debating the Commander-in-Chief power, but lacking a conclusion for the exchanges by Mason, Lee, Nicholas, and Mason again).

<sup>225</sup> WARREN, *supra* note 222, at 819-20 (over 1,000 delegates attended various state ratifying conventions).

<sup>226</sup> North Carolina ratifiers had significant reservations with the draft and failed to ratify the first time. During the second convention, the "declare war" clause was read without debate, although the delegates debated the "standing army" proposal and the Commander-in-Chief power. With reference to the Commander-in-Chief power, the ratifiers in North Carolina had a view entirely consistent with the framers. See 4 ELLIOT, *supra* note 85, at 94-100, 107-08, 114-15.

<sup>227</sup> Reveley, *supra* note 85, at 128.

<sup>228</sup> 2 ELLIOT, *supra* note 85, at 195, 348-50 (Connecticut and New York respectively); 3 *id.* at 201, 393-94 (Virginia). Undoubtedly the violation of this maxim was debated in other states as well, owing to its popularity, but the extant records are silent.

respective powers to fund a military and to employ that military. Several ratifiers perceived that the Constitution violated this maxim because Congress evidently held both powers. Several champions of liberty quickly made this a point of contention.<sup>229</sup> The records are difficult to follow, but in all three debates the response<sup>230</sup> was that a large, popular assembly like Congress could be safely trusted—unlike a monarch.<sup>231</sup> These debates clearly show that the ratifiers, in at least three states, recognized that Congress wielded the decisional war powers.

Given the inadequate record and the sporadic treatment of the war powers, the ratification materials contribute little to understanding the framers' original intent. Standing alone they neither add to nor subtract from the war powers model developed earlier.<sup>232</sup> The clearest expressions of overall understanding and the states' concerns are found in the ratification documents returned to Congress.<sup>233</sup> Some states ratified without comment; others like Rhode

<sup>229</sup> See 3 ELLIOT, *supra* note 85, at 172 (Patrick Henry refused to attend Philadelphia convention because he "smelled a rat," and at Virginia convention he emphatically derided violation of sacred maxim by empowering Congress to "declare war and carry it on, and levy your money, as long as you have a shilling to pay"). See also 3 *id.* at 378–81 (referencing George Mason's objections; he had voiced same at Philadelphia and ultimately did not sign proposed Constitution). See also 1 FARRAND, *supra* note 86, at 139–40, 144, 146, 338–39.

<sup>230</sup> 2 ELLIOT, *supra* note 85, at 348–49 (Hamilton's defense at New York convention is only marginally responsive; he notes that it would be difficult to corrupt an entire legislative body in two years' time and persuade them to abuse war and purse powers.).

<sup>231</sup> See also 2 *id.* at 195 (Oliver Ellsworth); 3 *id.* at 201 (Governor Randolph); *but see* 3 *id.* at 393–94 (summarizing James Madison's response; he apparently either gets confused or is using the term "sword" in a different way, for he implies that the President wields the "sword," although he mentions that "[Congress has] the direction and regulation of land and naval forces").

<sup>232</sup> The clearest expositions on the power to "declare war" are found in Pennsylvania, 2 *id.* at 528–29, and in New York, 2 *id.* at 278 (equates "declaring war" to the same power under the Articles of Confederation to decide for war or peace). The clearest exposition on the "Commander-in-Chief" power is found in North Carolina, 4 *id.* at 107 (explaining President's power in terms of operational control only). See *supra* note 226.

Framer participation in the debates differed greatly from state to state. At this time, the ratifiers had no other record of the federal convention's discussions or debates. In one recorded instance, a framer attempted to recount the Philadelphia debate on the war powers for his state's delegation. His summary was inadequate to convey the framers' thoughts on the matter as reflected in the subsequently published convention records. See Reveley, *supra* note 85, at 106–07. Without some recorded concrete interactions between the framers and ratifiers, it is extremely difficult to evaluate how well their respective understandings matched, and ultimately what the ratifiers' understandings were within a particular state. In many instances, the states probably ratified portions of text that they either did not understand or understood imperfectly, vis-à-vis the framers.

<sup>233</sup> 1 ELLIOT, *supra* note 85, at 322–23 (Massachusetts), 325 (South Carolina), 325–27 (New Hampshire), 327 (Virginia), 327–31 (New York), 333 (North Carolina, second time), 333–37 (Rhode Island). The remaining six states responded without comment, declaration, reservation, or recommendation.

Island returned massive declarations of proposed amendments. None of the states expressed serious concern with the Constitution's war powers model.

**5. More *Extrinsics*: Contemporaneous Construction.**<sup>234</sup>—Reliance on contemporaneous construction to refine the meaning of a written instrument often is indispensable, especially with a vague and general document like the United States Constitution. Within his rules of interpretation, Professor Story states: "Much also, may be gathered from contemporary history and contemporary interpretation, to aid us in just conclusions."<sup>235</sup> In explaining why he did not publish his diary of the convention earlier, Madison stated: "In general it had appeared to me that it might be best to let the work be a posthumous one; or at least that its publication should be delayed till the Constitution should be well settled by practice . . ."<sup>236</sup> Contemporaneous construction undeniably furnishes meaning; however, a host of problems attend its use *as* a source of textual meaning. Without the exercise of extreme care, practices cited *as* being indicative of "true" meaning can lead to absurd constructions.

(a) *The Peculiar Problems with Interpreting Practices.*—Practices often arise within the context of severe time pressures, especially in the war powers arena. The actors find themselves operating under urgent circumstances, and they adopt courses of action that are inconsistent with their personal philosophies, or worse, inconsistent with the Constitution. President Abraham Lincoln undoubtedly felt an urgent need to act on April 12, 1861, when Confederate forces attacked Fort Sumter, South Carolina. Lincoln responded, and his unilateral acts became the famous eleven weeks of "constitutional dictatorship."<sup>237</sup> After Lincoln, the Commander-in-Chief clause never returned to its anemic *ante-bellum* construction.

Practices often result from extra-constitutional factors having little to do with translating the Constitution's words into deeds. Actors frequently create, or at least stretch, constitutional text and theory to justify practice. Often this justification process occurs after the act has taken place.

President James Monroe's administration provides an example.<sup>238</sup> In 1818, Georgia faced cross-border raids from runaway

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<sup>234</sup> See *supra* note 84 (definition as used in this article); see *generally* 1 STORY, *supra* note 94, §§ 405a-407.

<sup>235</sup> 1 STORY, *supra* note 94, § 404.

<sup>236</sup> WILLIAM PETERS, *A MORE PERFECT UNION* 250 (1987).

<sup>237</sup> KEYNES, *supra* note 113, at 101-07.

<sup>238</sup> See *generally* Schlesinger, *supra* note 26, at 26-27, 36-37 (discussing basic facts of incident).

slaves and Indians operating out of Spanish Florida. Monroe felt compelled to undertake limited military operations to stop these raids. Without consulting Congress, Monroe dispatched General Andrew Jackson with orders to act in self-defense, pursue the Indians into Florida if necessary, and avoid conflicts with the Spanish.<sup>239</sup> General Jackson proceeded to invade Florida, attack a Spanish fort, hang two British citizens, and occupy Pensacola, the capital of Spanish Florida.<sup>240</sup> Several cabinet members viewed these aggressions as the initiation of war, and Congress was not far behind. A war powers problem arose. Monroe's Secretary of State, John Q. Adams, tried to persuade the President and his cabinet to justify these warlike acts by categorizing them as "defensive" or as incidental to a defensive military operation.<sup>241</sup> Monroe rejected this creative expansion of the President's well-established power to repel sudden invasions, but he did not repudiate Jackson's acts (or court-martial him as Secretary of War John Calhoun advised). The executive branch had acted beyond its constitutional authority, but because of extra-constitutional factors, the acts stood.<sup>242</sup> Jackson's campaign persuaded Spain to sell Florida, which eliminated the security threat posed by Spanish Florida and expanded America's borders. Politically, Jackson was a hero. Subsequent presidents would justify unilateral uses of force using the broad interpretation of the Commander-in-Chief's "defensive" war powers invented, but rejected, by the Monroe Administration.

Using contemporaneous constructions to give meaning to the Constitution is problematic. Time pressures and extra-constitutional factors, totally independent of the text or the "intent of the framers," often impelled these early officials attempting to run national government. Even the framers, at times, acted inconsistently with their prior words and deeds.<sup>243</sup> Despite the problems,

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<sup>239</sup>There are at least two conflicting versions of the orders that President Monroe gave to General Jackson. One version, as presented in the text, represents that Monroe was blameless and General Jackson was out of control. A second version represents that Monroe, in the secret (never found) "Rhea Letter," authorized General Jackson to invade Spanish Florida. See HARRY AMMON, JAMES MONROE, THE QUEST FOR NATIONAL IDENTITY chs. 23-24 (1971); SAMUEL F. BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY chs. 15-19 (1949).

<sup>240</sup>13 WORLD BOOK, *supra* note 92, at 616 (*James Monroe*) (discussing more facts of incident).

<sup>241</sup>CLARENCE BERDAHL, WAR POWERS OF THE EXECUTIVE IN UNITED STATES 65-67 (1921) (discussing facts of incident and fiery cabinet meeting in which John Q. Adams presented his theory for justification).

<sup>242</sup>Cruden, *supra* note 10, at 45 n.39 (discussing additional facts of incident and indicating failure of Congress to repudiate this presidential act made future executives less reluctant to interpret their "defensive" war powers in an expansive manner). See also RICHARD W. LEOPOLD, THE GROWTH OF AMERICAN FOREIGN POLICY 97 (1962).

<sup>243</sup>Jefferson, who was not a framer, was influential in the early days of the Republic. Philosophically he was a champion of legislative dominance, but as Presi-

contemporaneous construction has at least two valid uses with respect to constitutional construction—interpretive use and substantive use. But scholars must carefully examine the full historical context of each cited word and deed to derive their true implications. On close examination, the implications often will be too uncertain to provide authoritative textual meaning.

(b) *Use of Contemporaneous Construction.*—In the search for original intent, contemporaneous construction can provide useful extrinsic materials. Constitutional jurisprudence recognizes two valid uses for contemporaneous construction. They are related, yet distinct and often confused. With regard to the Constitution's war powers, one must have a clear grasp of contemporaneous construction—its two valid uses, the requirements for each use, and the concomitant implications of such use—because subsequent words and deeds have filled so many of the gaps left for extrapolation.

(i) *Interpretive Use to Explain and Expand the Drafters' Intent.*—Interpretive use is the classic use for contemporaneous construction.<sup>244</sup> Professor Story states:

Contemporary construction is properly resorted to, to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit, to which it is entitled.<sup>245</sup>

Use in this manner is limited in certain respects and broad in others. First, it is limited with respect to the group of actors whose contemporaneous constructions are relevant. Professor Story implies this in

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dent he found himself in several situations where realities governed his acts more than philosophical purism. **See** FORREST M. McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 60–61 (1976) (discussing President Jefferson's immediate military response to the pasha of Tripoli's declaration of war, which Jefferson later apparently thought was beyond his constitutional authority); *id.* at 64–68 (recounting amazing saga of Jefferson's adroit use of threats of war, diplomatic maneuvering, manipulation of Congress, and luck to seal the Louisiana Purchase and secure America against significant Spanish and French presence); **see generally** HAROLD C. RELYEA, *LIBRARY OF CONGRESS, GENERAL RESEARCH DIVISION, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES* (1974).

Of course, some inconsistencies potentially are attributable to changed views. **See** HENKIN, *supra* note 10, at 298 n.12; *id.* at 297–98, n.10 (referencing an apparent change in Jefferson's views); **see supra note 217 (referencing Hamilton's apparent change of views).**

<sup>244</sup> *See, e.g.*, *Myers v. United States*, 272 U.S. 52 (1926) (invalidating a legislative enactment requiring Senate concurrence for presidential removals from office based on contemporaneous constructions furnished during the First Congress in the new republic and on James Madison's writings).

<sup>245</sup> 1 STORY, *supra* note 94, § 407.

the above discussion. Obviously, constructions from the framers themselves are “entitled” to the greatest “credit,” because throughout the earliest days of the Republic only the framers had a personal knowledge of the federal convention—its proposals, discussions, debates, and compromises.<sup>246</sup> Others who interacted closely with various framers had a glimpse of their intent,<sup>247</sup> and those who read pamphlets and works like *The Federalist Papers* also had some understanding. Given the number of variables and uncertainties, very little “credit” should be given to contemporaneous constructions by nonframers unless clear evidence of special knowledge exists.

Second, interpretive use is broad in the sense that any expressive activities are relevant. This includes any writings, any spoken words, and any acts or practices.

Finally, interpretive use is somewhat limited because there must be some extant text to interpret. Without text to explain or expand, this approach is impossible. Not every detail must be expressed; in fact, the primary utility of this form of use is in providing specific detail to the general constitutional framework.

By implication, a corollary rule governs this form of use. As Professor Story states: “It [contemporary construction] can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.”<sup>248</sup> For these reasons, construction of the original conceptual model is vital: as it sets boundaries for the use of this type of extrinsic material.

Sufficient war powers text exists for this form of contemporaneous construction to be helpful. For example,<sup>249</sup> President Washington, relying solely on his independent powers as Commander-in-Chief, authorized General Wayne to dislodge, if necessary, a British force located twenty miles within the undisputed American boundary. Washington dispatched General Wayne primarily to fight Indians, and General Wayne was able to accomplish his mission without attacking the British. If these are the facts, this act by a framer serves to explain and provide specific meaning to the Commander-in-Chief’s “defensive” war powers. Washington construed his independent powers as Commander-in-Chief narrowly.

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<sup>246</sup>The best record of the constitutional convention, derived from Madison’s notes, was not published until 1840. Peters, *supra* note 236, at 250.

<sup>247</sup>Thomas Jefferson, a close friend of Madison, possessed a copy of Madison’s notes from the beginning. To the extent that he read and studied these notes, he may have had a better understanding than most. Id. at 249.

<sup>248</sup>1 STORY, *supra* note 94, § 407.

<sup>249</sup>BERDAHL, *supra* note 241, at 62–63.

When there really is no text to construe, the second use for contemporaneous construction becomes relevant. This is where the confusion generally begins.

(ii) *Substantive Use When No Drafter's Intent Exists*.—In very limited situations, frequent repetition of a specific practice<sup>250</sup> that dates back to the earliest days of the Republic creates constitutional substance—a constitutional fact.<sup>251</sup> Professor Story implicitly recognizes the use of contemporaneous construction in this manner when he states:

[A]fter all, the most unexceptionable source of collateral interpretation [of the Constitution] is from the practical exposition of the government itself in its various departments on particular questions discussed, and settled on their own single merits. These approach the nearest in their own nature to judicial expositions . . . .<sup>252</sup>

Creation of the President's independent power to "recognize" foreign governments is a commonly cited example of substantive use.<sup>253</sup>

Substantive use differs from interpretive use in two key respects. First, because substantive use contains no interpretive aspect the framers need not be the actors.<sup>254</sup> Current practices are

<sup>250</sup>Professor Glennon establishes **six** stringent criteria for determining which acts or practices should be considered "custom." They are consistency—which is a necessary threshold requirement—numerosity, duration, density, continuity, and normalcy. The latter five are to be balanced together to determine how strong or weak the "custom" should be considered. Glennon, *supra* note 83, at 129–33. Before a practice can qualify as a "legislative" or "constitutional" fact, it must meet these six criteria—that is, it must be a "custom." *Id.* at 133–34. By these stringent criteria, very few presidential practices concerning the war powers can be considered "custom."

<sup>251</sup>William Taft probably was referring to this form of use when he stated, "So strong is the influence of custom that it seems almost to amend the Constitution." LOUIS FISHER, *PRESIDENT AND CONGRESS* 36 (1972).

<sup>252</sup>1 STORY, *supra* note 94, § 408.

<sup>253</sup>HENKIN, *supra* note 10, at 47, 93. The presidential power to recognize the official governments of other nations apparently originates from President Washington's reception of Citizen Edmond C. Genet from the newly established Republic of France in 1793. See McDONALD, *supra* note 207, at 123–27 (recounting President Washington's reception of Citizen Genet, making the United States the first nation to receive an emissary from the Republic of France).

<sup>254</sup>See generally Glennon, *supra* note 83 (discussing in specific terms this concept of custom and its effects, and proposing a methodology for the principled use of custom in resolving separation of power disputes). Professor Glennon's use of the term "custom" is broader than the present author's definition of constitutional custom—that is, a pattern of specific practices which substantively fill gaps left in the constitutional text. Professor Glennon suggests that a true "custom" meeting all the stringent criteria of his methodology serves to actually realign constitutional powers between the political branches, unless the Constitution expressly prohibits the realignment. *Id.* at 127–29. Despite the minor definitional differences, his proposed

relevant to substantive use. Though this form of use did not “die out” with the framers, to have the greatest legal impact a practice must have begun during the earliest days of our Republic. Second, unlike the interpretive form of use, not all expressive activities are relevant to the substantive form of use. Substantive use requires an act or practice, not a mere written or oral assertion of constitutional authority.<sup>255</sup> The need to unambiguously place other governmental entities on notice of the potentially challengeable act or practice is the reason for this latter requirement.<sup>256</sup> Challenged acts or practices generally do not result in the creation of constitutional substance<sup>257</sup>—there must be longstanding acquiescence by the other governmental entity that matches the longstanding practice.

A critical aspect of substantive use is the impact it may have on constitutional balances of power. Based on legal precedent,<sup>258</sup> courts should treat practices differently depending on when they began. Generally, only those practices traceable to the earliest days of our Republic are “constitutional facts;”<sup>259</sup> all other practices are mere “legislative facts.”<sup>260</sup> The difference is significant from a legal

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methodology is relevant to this discussion. The key difference is that the development of conceptual models in this article serves to provide a more defined separation of the war powers than is expressly stated in the Constitution. Without the use of models, Professor Glennon must address a much more ambiguous separation of powers problem using his methodology. For a more recent although much less detailed discussion, *see also* Glennon, *supra* note 70, at 89–91 (reiterating problems with citing custom as precedent for constitutional authority in Desert Storm context).

<sup>255</sup> Glennon, *supra* note 83, at 134–35.

<sup>256</sup> *Id.* at 135–37.

<sup>257</sup> *Id.* at 137–44.

<sup>258</sup> The issue is hypothetical regarding the constitutional division of the war powers, because there have been no adjudications on the merits, either prior to or under the WPR. However, if the policy of *stare decisis* means anything, the probable outcome is as stated in this article. *See also id.* at 145–46 (citing three Supreme Court cases that required longstanding customs to also have their origins in early Republic to be considered “constitutional facts”). *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 327–28, (1936) (stating that Court has ultimate power to determine constitutionality of a practice, in that case a congressional practice, notwithstanding its frequency, duration, and origins in earliest days of the Republic).

<sup>259</sup> The first Supreme Court case discussing the relevancy of custom was *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). The Court upheld the constitutionality of a custom “practiced and acquiesced under a period of years.” The custom in question was the constitutionality of having Supreme Court Justices ride a circuit. The custom apparently began before 1790, when Chief Justice John Jay wrote an “advisory opinion” to President Washington stating that in his opinion the custom was unconstitutional. However, the practice continued until challenged in *Stuart*. In its opinion, the Court stated that the custom was “a contemporary interpretation of the most forcible nature . . . too strong and obstinate to be shaken or controlled.” *Id.* at 309. Thus, the rationale for allowing mere repeated practice (custom) to fix the “construction” of the Constitution appears to be that the framers’ intended it. Washington intended it and thought the practice was constitutional, although the Court does not mention his earlier involvement.

<sup>260</sup> Glennon, *supra* note 83, at 144–46.

standpoint, because practices that are “legislative facts” may be overcome by subsequent congressional enactments. For example, if a court found that the presidential practice of using force based on the President’s independent authority as Commander-in-Chief was a “legislative fact,” then a subsequent congressional enactment, such as the WPR, would bind presidents and circumscribe their powers. Conversely, if a court found that the presidential practice was a “constitutional fact,” little doubt remains that a mere enactment could not bind the President. In effect, a practice arising to the level of constitutional fact settles the matter under the Constitution. Clearly, this is a substantive form of use.

Past practices have largely determined the current allocation of the war powers. The framers’ conceptual model has been implicitly rejected. Coalescence of a diverse web of presidential practices, novel constitutional theories, and assorted court dicta is the basis for the President’s broad claim on the war powers. Though most of these presidential practices and theories have dubious constitutional foundations, and few meet the requirements for valid use as contemporaneous construction, courts have been unwilling to settle the matter. So far all presidents have escaped a final adjudication of their war powers.

(c) *Early Probative Contemporaneous Construction.*—

Contemporaneous construction legitimately meeting the above requirements provides useful extrinsic materials in the quest to discover the “intent of the framers.” Two questions arise: (1) are there interpretive contemporaneous constructions by framers that alter or invalidate the original conceptual model; and (2) are there long-standing practices traceable to the earliest days of the Republic that provide additional substance to the conceptual model? A brief survey shows, however, that neither question receives much of an historical response.

President George Washington’s two terms were relatively peaceful. Indian tribes in the North and South caused continuous problems for settlers during his first term,<sup>261</sup> and the Whiskey Rebellion occurred in his second term.<sup>262</sup> Neither of these situations had significant implications for the war powers.

During the Whiskey Rebellion, Congress passed a law calling forth the militia to suppress this insurrection, and Washington became the first and last Commander-in-Chief to take brief field

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<sup>261</sup> McDONALD, *supra* note 207, at 99.

<sup>262</sup> Glennon, *supra* note 83, at 145–47 (discussing Washington’s initiative in shaping events and being accused of manipulating Congress and public by overstating the threat).

command of the militia.<sup>263</sup> Practices during this suppression of the Republic's first rebellion nominally<sup>264</sup> ratify the conceptual model: Congress as the decision-maker and the President as the commander of operations.

Whether the President or Congress had the final authority to declare neutrality was the most significant war powers-related issue addressed during Washington's presidency, and this issue arose late in Washington's first term. In 1793, French sympathizers challenged Washington's constitutional authority to proclaim American neutrality in the French-British War. The controversy inspired the *Pacificus-Helvidius* (Hamilton)-(Madison) exchange, which grew into a broad debate about the extent of the executive's foreign affairs power.<sup>265</sup> Just over one year later, this presidential "practice" of declaring neutrality ceased. On June 5, 1774, Congress passed the first in a long succession of Neutrality Acts. However, the arguments of Hamilton, which essentially contradicted his *Federalist Papers* views, provided the basis for subsequent expansion of the President's foreign and domestic powers.<sup>266</sup>

President John Adams conducted an "imperfect" naval war with France for about two years.<sup>267</sup> Adams worked closely with Congress, and perhaps even manipulated Congress, to avoid a formal declaration of war that many congressmen wanted. Former Senator Jacob Javits has argued that the Constitution's system of divided war powers was the key to avoiding full war.<sup>268</sup> Whatever the cause, avoiding war probably was fortunate, because a full war with France would have been disastrous for America.<sup>269</sup> Adams sought and

<sup>263</sup> RELYEA, *supra* note 243, at 6.

<sup>264</sup> But the conceptual models already were beginning to break down, as President Washington drew broad outlines for the presidency through his practices and assumed more and more control over the decision-making and policy functions. SOFAER, *supra* note 112, at 127-29.

<sup>265</sup> See HENKIN, *supra* note 10, at 82-4. Madison likely would have narrowed the constitutional issue even further because the President's act involved the decisional war powers of Congress. Madison employed the simple argument that the power to "declare war" surely implied the converse: the power to decide not to "declare war." Unfortunately, both verbal combatants let their arguments develop into broad discussions concerning which political branch controls determination of America's foreign policy. See generally CORWIN, *supra* note 33, at 178-81; McDONALD, *supra* note 207, at 113-45 (providing a full account of these events set within an historical context).

<sup>266</sup> See *supra* note 217.

<sup>267</sup> See generally JACOB K. JAVITS, WHO MAKES WAR 26-35 (1973) (discussing his view of the quasi-war with France); but see BERDAHL, *supra* note 241, at 80-84 (discussing his contradictory view of the quasi-war with France).

<sup>268</sup> JAVITS, *supra* note 267, at 30.

<sup>269</sup> BERDAHL, *supra* note 241, at 84.

obtained congressional authorization to conduct his “imperfect” war,<sup>270</sup> which is consistent with the model.

Just four months prior to obtaining congressional authorization, however, Adams had informed Congress of his policy decision to allow merchant vessels to arm (reversing a former policy).<sup>271</sup> This action was inconsistent with the model, because such a presidential policy decision could have triggered war or enlarged an “imperfect” war. In response, several leaders, including then Vice-president Jefferson and Madison, voiced opposition to what they believed **was** an act beyond presidential authority.<sup>272</sup> Despite these protests, the act stood.

Thus, under Adams, the President’s role in making war-related policies expanded. Congress already was beginning to suffer from institutionally embedded vices. This early practice provided a basis for similar policy initiatives by subsequent presidents.<sup>273</sup>

President Thomas Jefferson conducted a war with the Barbary pirates for approximately four years. Depending on the account, Jefferson either deferred to Congress’s decisional war powers<sup>274</sup> or covertly authorized and prosecuted his own private war.<sup>275</sup>

Though Jefferson was an outspoken opponent of broad executive power, his actions regarding these pirates are astonishing. He

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<sup>270</sup>During the “quasi-war” with France, Congress enacted more than **20** laws authorizing the conflict and dealing with captures. **HOWARD A. NASH, THE FORGOTTEN WARS, 1798–1805: THE ROLE OF THE U.S. NAVY IN THE QUASI-WAR WITH FRANCE AND THE BARBARY WARS, 1798–1805** 55–56, 59, 64–67 (1961). See **BERDAHL**, *supra* note **241**, at **83** & n.29, **84**; **KEYNES**, *supra* note **113**, at **37**.

<sup>271</sup>**BERDAHL**, *supra* note **241**, at **67**.

<sup>272</sup>*Id.* at **67–68** (discussing strong denouncements by both Jefferson and Madison of this change in policy that could have led to full war, thereby usurping Congress’s decisional war powers). See also *id.* at **81** (more of Madison’s denouncements against Adams usurpations of war powers). John Adams was not a framer in the sense that he did not attend the federal convention. **QUINN**, *supra* note **165**, at **110**.

<sup>273</sup>**BERDAHL**, *supra* note **241**, at **69**,

<sup>274</sup>In December **1801**, President Jefferson addressed Congress and stated that his deployment of American naval forces against the Barbary pirates for defensive purposes was beyond his independent constitutional authority. He deferentially requested congressional authority to conduct both an offensive and defensive limited war. Congress responded with a broad grant of authority. By some accounts Jefferson already was prosecuting full war, and this address was disingenuous. See **TURNER**, *supra* note **10**, at **60–61**. Hamilton apparently thought it was genuine, for he attacked Jefferson’s limited view of the President’s war powers. **BERDAHL**, *mpa* note **241**, at **63–64**. Cf. **WRIGHT**, *supra* note **81**, §**209**.

<sup>275</sup>Compare **JAVITS**, *supra* note **267**, at **37–38, 40–41, 46–49** and **TURNER**, *mpa* note **10**, at **59–60** with **Biden & Ritch**, *supra* note **32**, at **375–76**. See also **BERDAHL**, *supra* note **241**, at **63–64**; **KEYNES**, *supra* note **113**, at **38–39** (giving an apparently neutral account of Jefferson’s handling of the Barbary wars); See generally *id.* at **191** n.30–33 (citing numerous other sources).

independently deployed naval forces against a foreign power to protect an inchoate national interest—foreign trade—276 and did not consult Congress until much later. Professor Henkin cites Jefferson's act as the basis for subsequent presidents who have "assert[ed] the right to send troops abroad on their own authority."<sup>277</sup> This episode underscores a problem with relying on contemporaneous constructions. Jefferson's acts strongly contradicted his words. Both proponents and opponents of broad presidential war powers can cite portions of this same historical event to bolster their arguments.

The final contemporaneous construction of significance occurred during Madison's presidency. The interaction between President James Madison and Congress, leading to America's first declared war, the War of 1812, is consistent with the conceptual model. Though Madison felt that the nation was unprepared for war, he believed that most Americans wanted war and that British insults had been tolerated long enough.<sup>278</sup> This was not an occasion when the President merely presented Congress with a *de facto* war and then asked for approval. Madison recommended that Congress declare war and left the decision to them, stating:

Whether the United States shall continue passive under these progressive usurpations . . . or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of events . . . is a solemn question, which the Constitution wisely confides to the legislative department of the government.<sup>279</sup>

Congress needed eighteen days to declare war. America's poor military showing vindicated Madison's belief that his nation was not

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<sup>276</sup> Today's commanders-in-chief probably would argue that the military action was justified (1) to protect American sailors' lives; and (2) to enforce the law pursuant to the "take care" clause, because in 1798, Congress had enacted a law to protect trade using naval force if necessary. TILNER, *supra* note 10, at 59–60. It is difficult to understand Jefferson's actions concerning this incident. On one hand he seemed to manipulate the information flow to Congress so that he could prosecute the war as he desired; and on the other hand he deferred to Congress's war powers and chose to ignore simple legal arguments that could have justified even his secretive acts.

<sup>277</sup> HENKIN, *supra* note 10, at 53. See also KEYNES, *supra* note 113, at 39 (discussing land campaign by a quasi-United States force that the Jefferson Administration apparently knew about and approved; this ground force's advance against Tripoli ultimately ended the conflict). See generally McDONALD, *supra* note 243, at 60–61, 90–100; WRIGHT, *supra* note 81, §§ 209–10 (displaying how contemporaneous construction is abused and how practices progressively build and enlarge on one another far beyond scope of original practice).

<sup>278</sup> See Biden & Ritch, *supra* note 32, at 376; 13 WORLD BOOK, *supra* note 92, at 31–32 (*Madison, Jams*). See also J. MALCOM SMITH & STEPHEN JURIKA, JR., "THE PRESIDENT & NATIONAL SECURITY 7–8 (1972).

<sup>279</sup> James Madison, War Address to Congress (June 1, 1812), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 484–90 (James D. Richardson ed., 1897).

prepared for war, but he nevertheless deferred to Congress's decisional war powers.

(d) *Early Judicial Interpretations.*—A few early court cases assist in interpreting the Constitution's war powers. Like contemporaneous construction, however, judicial opinions are subject to abuses. The handful of war powers cases have been read, interpreted, cited, and generally manipulated to justify actions of doubtful constitutionality.<sup>280</sup> Therefore, scholars must handle this material carefully.

The first cases arise from President Adams' quasi-war with France.<sup>281</sup> They deal with the capture and confiscation of enemy ships as "prizes," and they establish the important precedent that the constitutional definition of "war" is broad—encompassing limited uses of force as well as full-scale war. Moreover, they establish that Congress is to decide the appropriate level of war, whether "general war. . . , [or] limited war; limited in place, in objects, and in time. . . ."<sup>282</sup>

An early pattern for political branch interaction within the war powers arena was for Congress to enact a law enabling the President to conduct military operations at his discretion within specified parameters. One such law enabled the President to call forth a state's militia under specified exigent circumstances.<sup>283</sup> In *Martin v. Mott*,<sup>284</sup> the United States Supreme Court upheld the constitutionality of legislation that delegated broad powers and discretion to presidents. Additionally, the Court held that only the President, within his discretion, could determine if one of the specified exigencies existed.<sup>285</sup> Thus, Congress could enable the President to meet almost any war powers exigency through broad delegations, but Congress also could specify parameters.

In *Brown v. United States*,<sup>286</sup> the Supreme Court held that the President's authority as Commander-in-Chief did not extend to con-

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<sup>280</sup> For example, Civil War cases are nearly a *sui generis*, as are the presidential practices which gave rise to those cases. However, scholars often indiscriminately cite such precedents to support their positions. See *supra* note 135; Wald, *supra* note 63, at 1413 & n.30 (discussing general abuses in use of judicial opinions for support).

<sup>281</sup> *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 4 U.S. (4 Dall.) 34 (1800).

<sup>282</sup> *Bas*, 4 U.S. at 43.

<sup>283</sup> Militia Act, ch. 36, 1 Stat. 424 (1795) (authorizing President to call forth the militia whenever "the United States shall be invaded, or be in imminent danger of invasion").

<sup>284</sup> 25 U.S. (12 Wheat.) 19 (1827).

<sup>285</sup> *Id.* at 29-30 (reiterating that delegated power was not unlimited, but was confined to exigencies specified by Congress).

<sup>286</sup> 12 U.S. (8 Cranch) 110 (1814).

fiscation of enemy property in time of "declared war" without express authorization from Congress.<sup>287</sup> This case epitomizes the initially anemic construction of the Commander-in-Chief power, and this interpretation of the Commander-in-Chief clause is too limited in light of the realities of modern warfare.<sup>288</sup>

Although *Durand v. Hollins* is neither an early case nor a Supreme Court decision,<sup>289</sup> it sanctions a significant addition to the President's operational war powers—the power to protect American lives and property abroad.<sup>290</sup> In *Durand*, the circuit court of appeals ultimately found a "political question." However, the court conducted a preliminary inquiry and determined that the President had plenary constitutional authority to deploy naval forces to Greytown, Nicaragua, for the protection of Americans and their property.<sup>291</sup> This case exemplifies judicial recognition of an early, longstanding practice.<sup>292</sup> No court has declared this authority a "constitutional fact," but it meets the criteria of one. Although Congress did not specify this power in section 2(c) of the WPR, Congress generally concedes that the Commander-in-Chief clause includes this independent power.<sup>293</sup>

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<sup>287</sup> *But cf.* HENKIN, *supra* note 10, at 96–97 (discussing narrow reading of the case [seizure of a private foreign vessel by a local United States Attorney merely claiming the mantle of executive authority is unconstitutional] and intimating that no court would ever follow the broader holding of this decision [the Commander-in-Chief lacks authority to confiscate a private foreign vessel during "declared war" unless Congress authorizes it] in light of intervening Civil War precedents and modern day realities).

<sup>288</sup> *See Brown*, 12 U.S. at 129, 144–45 (STORY, J., dissenting). Story's theory is unclear—whether Congress by declaring war implicitly granted this power to the Commander-in-Chief, or whether during "declared war" the Commander-in-Chief clause empowers the President to seize enemy property. Story admitted that Congress could have expressly limited or denied this power. The Commander-in-Chief ought to be given broad discretion to prosecute war successfully by means of his choosing within the parameters set by Congress. *See infra* notes 394–97 and accompanying text.

<sup>289</sup> *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D. N.Y. 1860) (No. 4,186) (opinion of court was delivered by Supreme Court Justice Samuel Nelson, who was riding circuit and later became Chief Justice of the United States Supreme Court).

<sup>290</sup> *See generally* HENKIN, *supra* note 10, at 54. This presidential power is important because of the frequency with which it is relied on by presidents. JAMES G. ROGERS, *WORLD POLICING AND THE CONSTITUTION* 92–123 (1945) (cataloging 150 presidential uses of force abroad with the great majority used for the protection of Americans and their property).

<sup>291</sup> *Durand*, 8 F. Cas. at 112. *See also In re Neagle*, 135 U.S. 1 (1890); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (holding that protection abroad was a "privilege and immunity" of American citizenship).

<sup>292</sup> Wald, *supra* note 63, at 1412 n.24. *See generally* CORWIN, *supra* note 33, at 194–204; *id.* at 199 (construing Jefferson's independent decision to use "defensive" force against Barbary pirates to protect Americans and their vessels as earliest example of this practice).

<sup>293</sup> Cruden, *supra* note 10, at 78–79 & n. 191; Ely, *supra* note 49, at 1393 & n. 46; TURNER, *supra* note 10, at 109–10 (arguing that this omission from § 1541(c) of the WPR was an error).

(e) *Later Practices by Presidents and Congresses.*—Though often cited **as** authoritative, most war power practices and underlying theories developed after the earliest days of the Republic have no value in altering the original conceptual war powers model. These practices have developed because they work. These practices were probably neither intended nor envisioned by the framers when they drafted the war powers to operate with Congress initiating war and the executive managing the war-fighting function. This is essentially the adaptivist approach to constitutional law.<sup>294</sup>

Usually there is no problem with this approach because the Constitution was meant to be adaptable. Problems arise when practice evolves so far that the conceptual model is effectively read out of the Constitution.

### C. Conclusions: *The Original Conceptual Models for the War Powers*

After considering and evaluating the intrinsic and extrinsic materials, five conclusions can be drawn regarding the framers' intent. First, the legislative and executive branches were to be war power partners. Second, the legislative branch was to dominate the partnership. Third, rather than having concurrent powers, each partner was assigned a specific function. Fourth, the legislative branch was to function **as** the contemplative, deliberate decision-maker. And fifth, the executive branch was to function **as** the faithful, energetic executor of the decisions.

## IV. The Conceptual Model Applied: Why Didn't We Follow the Model?

### A. *Executive Ascendancy*

In the wake of Operation Desert Shield–Storm, some may question whether Congress has a viable role in the war powers partnership. Executive authority led to the deployment of over 230,000 American soldiers to Saudi Arabia to draw a defensive “line in the sand.”<sup>295</sup> Executive speed and efficiency deployed the necessary military forces. Executive diplomacy and political maneuvering built and maintained the multinational alliance, secured the United Nations' sanctions, and kept Congress supportive.<sup>296</sup> Executive abil-

<sup>294</sup> See *supra* note 83.

<sup>295</sup> President Bush coined this phrase in an address from the Oval Office on August 8, 1990. 26 WEEKLY COMP. PRES. DOC. 1216–17 (Aug. 8, 1990); Rolph, *supra* note 70, n.66.

<sup>296</sup> Individually, there **was** some dissent. For example, 54 congressmen (63 members of the House; 1 Senator) filed suit asking the court to issue an injunction ordering the President not to use force against Iraq without prior congressional approval. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

ity to concentrate power destroyed the Iraqi forces with minimal friendly losses. Considering the framers' belief that they had created a weak executive and a stronger legislative branch,<sup>297</sup> what has happened since 1789 to alter the original balance of power so radically? The answers are found in the institutional nature of the partners, in the unforeseeable changes to warfare, and in America's changed role in world affairs.

### *B.A Threshold Concept: Fluctuating<sup>298</sup> Powers*

After the earliest administrations, the practices increasingly reflected general abandonment of the original model and adoption of a model where the partners shared indivisible concurrent<sup>299</sup> powers. Congress and the executive have since struggled for control.

Historically, exercise of the war powers has fluctuated depending on the relative strengths of the political branches at that time. Power in the war powers arena generally has flowed unidirectionally to the President. When courts abdicate their judicial review function, the only two mechanisms which cause governmental powers to fluctuate are legislative enactments<sup>300</sup> and practices

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<sup>297</sup>THE FEDERALIST No. 48, at 343-45, 347 (James Madison) (Bedamin F. Wright ed., 1961).

<sup>298</sup>Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ["Presidential powers are not fixed but fluctuate, depending on their disjunction or cojunction with those of Congress."]. See Biden & Ritch, *supra* note 32, at 394-96; Glennon, *supra* note 61, at 575-76. *Contra War Power Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. 468-70 (1971) (statement of Professor John N. Moore). But see TURNER, *supra* note 10, at 25-30; Eugene V. Rostow, *Hard Cases Make Bad Law*, 50 TEX. L. REV. 833, 896 (1972) (arguing that presidential war powers are derived directly from the Constitution and therefore are not subject to congressional derogation by enactments or otherwise). See generally Wald, *supra* note 63, 1411-14 (simple, well-documented discussion of the two main competing approaches).*

<sup>299</sup>The framers use of the word "Concurrent" did not necessarily refer to unidived or overlapping power.

Concurrent—(1) meeting; united; accompanying; acting in cojunction; agreeing in the same act; contributing to the same event or effect operating with (2) cojoined; associate; concomitant (3) joint equal; existing together and operating on the same objects, The courts of the United States, and those of the States have, in some cases, concurrent jurisdiction.

1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 44 (1828).

<sup>300</sup>See Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) [seizure of a French ship by a United States naval vessel based on presidential authorization was illegal because Congress had "spoken" through legislation and the President's authority was strictly circumscribed by that law; Chief Justice Marshall expressly did not interpret the President's independent war powers, but did note that in absence of legislation the President may have been able to order the seizure based on his own authority). This early case is the theoretical and precedential basis for Justice Jackson's proposed three-part analysis in Youngstown, 343 U.S. at 637. Jackson's methodology was dicta,

which rise to the level of legislative or constitutional facts.<sup>301</sup> Given these two mechanisms and the absence of any textual delineation of the war powers, the President frequently **has** been able to overpower the Congress in the war powers arena.<sup>302</sup> The very essence of the executive's role in government is to act with dispatch; legislative enactments take time and require a consensus.

Presidents began encroaching on Congress's powers by acting pursuant to alleged constitutional authority based on a variety of theories. Over a period of approximately 160 years, presidents gradually and methodically captured the war powers through practice. Congress eventually revolted by enacting the WPR, but nearly all presidents have considered the contest settled and victory theirs. From a constitutional perspective, the presidents are incorrect, but not a single court **has** attempted to liberate Congress by taking on this "political" challenge.<sup>303</sup>

### *C. Inherent Problems With the Model*

From the beginning, the model displayed inherent problems. The framers' experimentation with combining the strengths of two distinct branches into one national war power proved to be the model's undoing.<sup>304</sup> The problem was that the model formed a war powers partnership with two "unequally yoked"<sup>305</sup> branches.

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but the Supreme Court apparently adopted it in *Dames & Moore v. Reagan*, 463 U.S. 654, 680 (1981). Nor is Congress without the constitutional theory to justify broad legislation in support of its war powers. *See HENKIN, supra* note 10, at 71-72 (arguing that power to "declare war" implies power to "wage war and supports what is necessary and proper to wage war successfully. . . [t]he power to prepare for war and to act to deter and prevent war . . . the power to deal with the aftermath and the consequences of war"); *id.* at 81 (arguing that based on the "declare war" clause, Congress can decide the level of war by bill, resolution, and appropriation act); *id.* at 72 (arguing that congressional power is virtually limitless, "[t]he Supreme Court has never declared any limit to the war powers of Congress during war or peace or even intimated where such limits might lie"). *See also* 1 STORY, *supra* note 94, § 394 ("[I]f the usurpation should be by the president, an adequate check may be generally found, not only in the elective franchise, but also in the controlling power of congress, in its legislative or impeaching capacity . . .").

<sup>301</sup> *See supra* notes 250-60 and accompanying text (discussing that not every practice stands up under judicial review as a "constitutional fact" and if the practice is not such a fact it bows to subsequent legislative acts).

<sup>302</sup> *See generally* HENKIN, *supra* note 10, at 105 (arguing that in arenas like the war powers, "concurrent power often begets a race for initiative and the President will usually 'get there first'").

<sup>303</sup> Under Justice Jackson's methodology, if a war powers case is ever adjudicated on its merits, Congress has "spoken" through the WPR, and a presidential use of force contrary to the WPR should yield in all cases except where the court finds that the presidential practice is a "constitutional fact." For example, the Commander-in-Chief's authority to use force to protect Americans and their property abroad is probably a "constitutional fact."

<sup>304</sup> *But see* Forrest McDonald, *Forward* to THE CONSTITUTION AND THE AMERICAN PRESIDENCY at ix-x (Martin L. Fausold & Alan Shank eds., 1991) (arguing that a perva-

The framers expected Congress to be a body of sagacious men who could address national problems through the process of contemplative debate, negotiation, and compromise. Congress was to be the more representative branch and would serve **as** an integration point for public opinion, regional diversity, and concern for state and individual rights. The framers knew that Congress would be a relatively slow moving, deliberative branch. Consequently, the framers consciously assigned the decisional war powers to Congress—to give this weighty, serious matter appropriate consideration. Unfortunately, within the context of a national security crisis, Congress normally was unable to perform its war powers responsibilities.

The framers expected the executive to be an organization with a command-type structure and a unitary head who could address national problems by translating congressional guidance and policies into vigorous action. The framers believed that a President brought energy, unity, dispatch, secrecy, and initiative to government.<sup>306</sup> Waging war effectively required all of these characteristics. Consequently, the framers assigned the operational war powers to the President. Unfortunately, within the context of a national security crisis, the President was able to meet his war powers responsibilities and usurp Congress's **as** well. Eventually the President began a pattern of presenting a *fait accompli* to Congress.

In each crisis involving the war powers mechanism, Congress consistently deferred to the President<sup>307</sup>—the explanation being the inherent institutional differences in the political branches. The presidency arrived at the zenith of its power in crisis, and Congress was least able, or willing, to challenge the President in periods of crisis, even if the President infringed on its war powers.<sup>308</sup> **As** this interac-

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sive theme in works collected is that the bifurcated presidency, which the framers created, does not work well; the two divisions being the "Fast Track" (powers and functions which the executive unilaterally controls) and the "Slow Track" (powers and functions which the executive shares with one or both houses of Congress); also arguing that, rather than by genius and design, this dysfunctional bifurcation is more the product of slipshod craftsmanship and a desire to end the federal convention).

<sup>305</sup> 2 *Corinthians* 6:14 (King James).

<sup>306</sup> KEYNES, *supra* note 113, at 52; *See* THE FEDERALIST No. 70, at 451-52 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); *id.* No. 74, at 473 (the ability to direct common strength); *id.* No. 64, at 423 (John Jay) (secrecy and dispatch); King & Leavens, *supra* note 147, at 90-92 (ability to profitably process vast amounts of information and make rational decisions); CORWIN, *supra* note 33, at 225 (always in session, swift, secretive, in command of the widest information).

<sup>307</sup> JARED SPARKS, *THE LIFE AND WRITINGS OF WASHINGTON* 422 (1839) (discussing reality that ever since Washington's administration, responsibility for leadership and initiative during crisis settings **has** devolved on the chief executive). *See generally* REXFORD TUGWELL, *THE ENLARGEMENT OF THE PRESIDENCY* (1977).

<sup>308</sup> HENKIN, *supra* note 10, at 274; FOWERS OF CONGRESS 88-99 (R. Diamond ed., 1976); EAGLETON, *supra* note 23, at 146.

tive pattern persisted, the President gradually augmented his war powers. The executive eventually achieved preeminence through practice.

After each crisis passed, Congress generally failed to rectify any of the presidential encroachments. Although individual congressmen have always asserted themselves and certain congresses have battled specific presidents for short intervals,<sup>309</sup> Congress as an institution had never had a consistent, concerted effort to do anything about war power imbalances until passage of the WPR<sup>310</sup>—and it took the concurrence of extraordinary circumstances to give life to that legislation.<sup>311</sup> Within the context of peace and normalcy, the legislative branch quickly refocused on the burgeoning domestic problems, which were more numerous and complex than in the framers' day.<sup>312</sup>

From the standpoint of political realities, congressional indifference is somewhat understandable. Voters simply do not elect members of Congress based on their position regarding the war powers or even foreign relations. Therefore, congressmen hardly can be faulted for indifference when they merely reflect their constituents' priorities. By fixing the war powers and reestablishing a balanced partnership, Congress had to accept significant new responsibilities in an area where it possessed minimal expertise. A degree of congressional indifference also is attributable to a reluctance to take on more work and responsibility. In modern times, national security and foreign relations are complex and politically hazardous.<sup>313</sup> Congress generally is content to leave that responsibility with the President.<sup>314</sup>

Executive ascendancy is the natural consequence of the original conceptual model when it operates within the context of a series

<sup>309</sup>Biden & Ritch, *supra* note 32, at 374–86 (tracing two centuries of war powers practices).

<sup>310</sup>In general, consideration of war powers legislation in any form has been a “Cold War” phenomenon. See *supra* notes 8–9 and accompanying text.

<sup>311</sup>Glennon, *supra* note 61, at 581 (discussing inability of Congress to rectify any of the identified failures in WPR because of the lack of a constitutional war powers crisis).

<sup>312</sup>EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 171–82 (1947) (arguing that legislators are logically less concerned with “non-urgent” foreign relation topics such as war powers).

<sup>313</sup>Cf. George S. Swan, *Presidential Undeclared Warmaking and Functionalist Theory: Dellums v. Bush and Operation Desert Shield and Desert Storm*, 22 CAL. W. INT'L L.J. 75, 116 (1991).

<sup>314</sup>LOUIS W. KOENIG, *THE CHIEF EXECUTIVE* 10 (3d ed. 1975); Cf. TURNER, *supra* note 10, at 121–28 (arguing that during 16 years of existence WPR often has been used by Congress as a tool of political expediency and that little genuine congressional interest exists in rectifying constitutional imbalances).

of historical crises. Perhaps the framers should have foreseen the fatal flaw, but then they fully anticipated the need to amend their "imperfect" work.<sup>315</sup> The framers did not foresee Congress's indifference toward protecting its decisional war powers from the President. The original model did not call for such a power struggle; moreover, the framers thought that Congress had more than sufficient powers to protect itself—if it so desired. As Justice Jackson remarked in *Youngstown Sheet & Tube Company*, "[o]nly Congress itself can prevent power from slipping through its fingers."<sup>316</sup>

### *D. Exogenous Factors Creating Problems for the Model*

Though the framers were learned men that had the foresight to draft an adaptable national blue-print, certain developments simply were unforeseeable.<sup>317</sup> Hidden from the framers' vision were revolutionary developments in warfare and America's role in world affairs.<sup>318</sup>

1. *Unforeseeable Changes to Warfare.*—The United States is capable of waging highly destructive warfare anywhere in the world within hours. This knowledge likely would unsettle the framers. Perhaps even more disturbing would be the discovery that existing threats mandate such capabilities. Enhanced lethality,<sup>319</sup> increased rapidity,<sup>320</sup> and worldwide deployability<sup>321</sup> characterize the transformations in warfare which have taxed the original war powers model. From the beginning, the framers saw the need to assign the operational war powers to the President. The executive branch has kept pace with the changes in warfare through the development of various intelligence agencies, communication networks, the National Security Council organization, and the massive Department of Defense. The President has fulfilled his war power responsibilities. Conversely, as a deliberative and slow moving body, Con-

<sup>315</sup> See THE FEDERALIST No. 85, at 544–47 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>316</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 579, 654 (1952).

<sup>317</sup> Reveley, *supra* note 85, at 84–85, 146–47.

<sup>318</sup> But see THE FEDERALIST No. 11, at 138, 141–42 (Alexander Hamilton) (Benjamin F. Wright, ed., 1961) (arguing that a strong navy is necessary for America to project military power in protection of her global commerce; alluding to "the regions of futurity" when America might dominate the Americas); *id.* No. 24, at 208; *id.* No. 34, at 205. Perhaps other framers also shared Hamilton's vision.

<sup>319</sup> DEPARTMENT OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 3 (1991) [hereinafter DOD ANNUAL REPORT] (discussing proliferation of high technology weapons throughout even Third World countries. Also considers large conventional forces, which several countries possess).

<sup>320</sup> *Id.* at 133 (discussing need to move quickly to meet unpredictable, potent threats).

<sup>321</sup> *Id.* at 21, 81 (discussing high priority on maintaining and improving strategic mobility).

gress's ability to effectively harness this faster, more capable, and more dangerous "dog of war" has diminished.

Closely related to this expansion in military capabilities was the increasing ability to employ different levels of force in a variety of ways. The concept of an operational continuum<sup>322</sup> gradually replaced the concept of a few well-recognized, or customary, forms of conventional warfare<sup>323</sup>—that is, expanding the capabilities meant expanding the missions. Use of force, or threat of force, as an instrument of foreign policy became an increasingly viable option. From an historical perspective, lesser uses of force for irregular types of missions have been far more commonplace than use of conventional force for full-scale or limited wars.<sup>324</sup>

**2. Unforeseeable Changes to America's Role in the World.**—America evolved from a weak, isolationist nation concerned about "common defence"<sup>325</sup> for survival's sake, into a political, economic, and military world leader. This national metamorphosis, coupled with the increased ability to use force as an instrument of foreign policy,<sup>326</sup> profoundly effected the decisional war powers. Combined with negotiation and diplomacy, force is still a powerful tool in dealing with foreign nations. Notwithstanding the United Nations and its prohibition on aggressive force, Operations Desert Shield and Storm are stark reminders that not all nations are ready to "beat their swords into plowshares."<sup>327</sup> Integrating the use of force into a con-

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<sup>322</sup> See, e. &, DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS 26, 29 (3 Sept. 1991); DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 1 (5 May 1986) (referencing "spectrum of conflict," which is conceptually identical to an "operational continuum").

<sup>323</sup> The framers probably were familiar with the concepts of undeclared war (limited or "imperfect" war) and declared war ("perfect" war). Thus, they probably understood that war could be waged at varying levels of magnitude. But limited war-making capabilities probably narrowed their thinking as far as the nature of warfare to conventional forms. See *supra* note 150.

<sup>324</sup> BARRY M. BLECHMAN & STEPHEN S. KAPLAN, THE BROOKINGS INSTITUTION, FORCE WITHOUT WAR: UNITED STATES ARMED FORCES AS A POLITICAL INSTRUMENT (1978) (cataloging in excess of 200 lesser uses of force between 1798 and 1978).

<sup>325</sup> U.S. CONST. pmbl.

<sup>326</sup> Cf. Gerald R. Ford, State of the Union Message, Address Before Congress (January 19, 1976), in PHILIP VAN SLYCK, STRATEGIES FOR THE 1980's 37 (1981) ("a strong defensive posture gives weight to . . . our views in international negotiations; it assures the vigor of our alliances; and it sustains our efforts to promote settlements of international conflict"). See generally WRIGHT, *supra* note 81, §§ 214-20 (cataloging seven measures for directing force against another nation for foreign affairs purposes; arguing that the three major categories are diplomatic pressure controlled by the executive, economic pressure controlled by Congress, and military force, the control of which depends on the measure employed); ROGERS, *supra* note 290, at 21; DOD ANNUAL REPORT, *supra* note 319, at 4, 6-7 (announcing three defense priorities with clear foreign relations implications: collective security alliances, low intensity conflict resolution, and peacetime engagement—that is, nation building).

<sup>327</sup> Isaiah 2:4 (King James).

sistent foreign relations package is difficult for a Congress which neither controls the foreign relations apparatus nor maintains an institutional expertise in this vast and ever-changing area.<sup>328</sup> The executive's gradual ascendancy in foreign relations—which paralleled its ascendancy in the war powers—has placed it in a commanding position. Congress frequently is at the mercy of presidential foreign policy initiatives. These policies often result in committing America to the use of force,<sup>329</sup> allowing the President to encroach directly on Congress's decisional war powers.<sup>330</sup> Thus, weaving military force into the fabric of the President's management of foreign relations significantly curtailed Congress's ability to exercise the decisional war powers.

Not only was force integrated with foreign relations, but management of America's foreign relations also became an increasingly weighty matter. Because of its relative political, economic, and military strength, America became a world leader.<sup>331</sup> Internationalism replaced isolationism as the only viable option, because our national interests became increasingly tied to the interests of other nations on our shrinking globe. With the Soviet Union's demise, America's relative strength looms even larger in world affairs. Instead of "free world" leadership, others will look to the United States for global leadership. But leadership significantly increases the complexity and magnitude of the foreign policy issues. From an institutional standpoint, Congress's capacity to be a decisive decision-maker and an effective policy setter decreases as the complexity and magnitude of the issues increase. With so many complex and competing interests, the congressional methodology of contemplative debate, negotiation, and compromise breaks down.

### *E. Conclusions*

The framers were wise enough to anticipate changes to America's future situation and draft an adaptable Constitution. The quantity and quality of the changes—but not that changes have

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<sup>328</sup> See generally HENKIN, *supra* note 10, at 279 (citing examples of organizational reforms that Congress has implemented to meet its decisional foreign relations challenges and, indirectly, its decisional war powers responsibilities).

<sup>329</sup> JAVITS, *supra* note 267, at 242–47; Hollander, *supra* note 130, at 71 (addressing concept of collective security arrangements—bilateral and global, and deployment of "trigger forces" worldwide; such modern day national security arrangements replace the decisional portion of war powers in certain cases).

<sup>330</sup> See HENKIN, *supra* note 10, at 100–01 (arguing that the demarcation in this area is "elusive, sometimes illusory," but that Congress might be able to "veto" the situation and order extraction of the forces); *id.* at 344 n.23 (Hamilton believed that Congress could "veto" and thereby contain the President's initiative).

<sup>331</sup> BERDAHL, *supra* note 241, at 53–57.

occurred—might shock them. After all, they also lived in an era of rapid change. If the framers had foreseen these revolutionary developments, they may or may not have altered their war powers model. Their basic assumption was that a generalized model could accept contextual change through adaptation. Indeed, the original model may have remained functional, but for the more serious inherent problems with the model itself. These problems caused the model to become increasingly dysfunctional as the unforeseeable contextual changes occurred.

## V. Fixing the War Powers: Why Bother?

### A. Responding to Advocates of Status Quo

The advocates of status quo generally fit one of three<sup>332</sup> categories: those who consider the matter at a constitutional impasse; those who may or may not perceive that a problem with the war powers exists; and those who do not think fixing the war powers matters.

Advocates who consider the issue at a constitutional impasse believe that the problem cannot be resolved as a matter of constitutional law. Three primary approaches to resolving disputes concerning constitutional interpretation exist<sup>333</sup>—the interpretivist, the intentionalist, and the adaptivist approaches. The conceptual model for the war powers developed in this article uses a modified<sup>334</sup> intentionalist approach. Though quite illusive, one can discover the “intent of the framers” using accepted interpretive methods. There is substance in the “zone of twilight,”<sup>335</sup> and there need not be a constitutional impasse. By asserting this original conceptual model and relying on the judicially created concept of fluctuating powers,<sup>336</sup> Congress has the basic constitutional arguments to recapture the decisional war powers. Though the WPR was a poor first

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<sup>332</sup> Another type advocates acceptance of the status quo: the pragmatic-skeptic like Representative Dante Fascell, who believes that the WPR is “the most [Congress] can hope for.” Biden & Ritch, *supra* note 32, at 393.

<sup>333</sup> See generally Glennon, *supra* note 70, at 112–24 (summarizing and evaluating the three “jurisprudential tools ordinarily used to resolve other constitutional controversies” as applied to separation of power disputes; categorizing the three approaches as the textual (interpretivist) approach, the intentionalist approach, and the adaptivist approach; evaluating the strengths and weaknesses of each approach briefly).

<sup>334</sup> A pure intentionalist approach does not recognize the relevance of subsequent practice or custom, which the present author has considered. See *supra* notes 244–79 and accompanying text. See Glennon, *supra* note 83, at 119.

<sup>335</sup> See *supra* note 82.

<sup>336</sup> See *supra* notes 299–303 and accompanying text.

attempt, Congress effectively can reassert itself if it desires. The issue becomes whether America would benefit most from more adversative legislation or from some alternative remedy.

Advocates who may or may not perceive that a problem with the war powers exists apparently believe that to use the war powers effectively, Congress must bow to the President—as the executive is better equipped to wield the war powers. These advocates believe that what matters is not *who* uses the war powers, but that they are used effectively—that the “ends justify the means.” This approach contravenes John Locke’s view that a government is of laws and not of men.<sup>337</sup> If the rule of law means anything, and if Americans truly value a constitutional government, the executive’s accumulation of war powers must be addressed. The issue is how much further America can go without formally amending our eighteenth century Constitution.

Advocates who do not think that the war powers is worth fixing recognize that a war powers problem exists, but apparently envision a limited role for America in the “new world order.”<sup>338</sup> The Cold War has ended, but America cannot simply retreat within its borders. In the short term, regional conflicts proliferate *as* the world settles into this new order.<sup>339</sup> For the long term, no worldwide coalition can effectively end all use of force in a world of scarce and declining resources. Fixing the war powers to ensure that the political branches cooperate in the use of force does matter. The issue is not whether America will be a participant and leader in world affairs; the issue is how to effectively organize our government to meet the challenges of the twenty-first century.

## *B. The Problem: Constitutional Level*

1. *Growing Constitutional Imbalances.*—Within the war powers arena at least two disturbing trends that involve constitutional principles arise. First, the framers attempted to prevent the accumulation of power anywhere within government by adopting the principle of “separation of power[s].” They believed that accumulations of power destroyed popular governments.<sup>340</sup> The executive’s almost exclusive control over the once divided war powers should send a clear warning signal.<sup>341</sup> Second, the framers

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<sup>337</sup> RELYEA, *supra* note 243, at 1.

<sup>338</sup> See *supra* note 5.

<sup>339</sup> DOD ANNUAL REPORT *supra* note 319, at 7, 43–44.

<sup>340</sup> THE FEDERALIST NOS. 47, 48 (James Madison) (Benjamin F. Wright ed., 1961).

<sup>341</sup> Cf. FRANCIS D. WORMUTH AND EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW (1986) (arguing that the framers wanted a

attempted to achieve an "equilibrium"<sup>342</sup> of balance<sup>343</sup> and cooperation<sup>344</sup> within government by resorting to a system of "checks and balances" to blend the separate branches. Congress's constitutional checks, however, have not effectively prevented executive encroachments. How far can this destabilizing process go? With respect to the war powers, America's Constitution already may be reaching the limits of mutability.

## 2. *Sliding Down the 'Slippery Slope' Without a Brake?*

(a) *The Legislature: A Non-Player by Fate.* — The Constitution arms Congress with several powerful checks. Within the war powers arena, these checks have proven to be unwieldy, time consuming to use, and dependent on normally nonexistent bipartisan support. These checks have lacked consistent effectiveness. Congress, when using its checks, has not always exercised sound discretion and self-restraint. Congress typically uses its checks in a reactionary mode. For example, in the latter stages of the Vietnam War, after the United States' main withdrawal, Congress aggressively used its checks and "legislated peace in Indochina."<sup>345</sup> Congress was reacting to what it perceived as presidential abuse of the war powers. Congress's acts unduly interfered with the President's war powers and may have contributed to the unsatisfactory outcome by restricting the use of funds to support the war.<sup>346</sup>

Congress's most potent check is the power of the purse, because Congress holds plenary authority.<sup>347</sup> Advocates of its use

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decision as important and potentially fateful as whether to prosecute war to be left in the hands of many. War powers modernly lie with the President, who is but one man, subject to human error and other frailties which the framers sought to guard against). Although the President may be the ultimate decision-maker, this view discounts the role that the executive's national security advisors play. There is group decision-making, but Congress is not always included.

<sup>342</sup> Richardson, *supra* note 78, at 738.

<sup>343</sup> JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 136 (2d ed. 1983) (explaining that the integrated system of "checks and balances" was intended to ensure political independence of the three branches, thereby maintaining balance of powers originally established).

<sup>344</sup> A logical corollary to the system of "checks and balances" is that to get anything accomplished the branches must cooperate and accommodate one another. See HENKIN, *supra* note 10, at 108-09, 279; KEYNES, *supra* note 113, at 16.

<sup>345</sup> TURNER, *supra* note 10, at 33.

<sup>346</sup> *Id.* at 29-33 (discussing string of legislative solutions to the Vietnam War—barring use of appropriated funds for introduction of ground troops into Laos or Thailand; the Cooper-Church Amendment, which generally "cut-off" funds for the war in Indochina after August 15, 1973, and after withdrawal of American ground forces, the progressive curtailment of aid requests); Moore, *supra* note 63, at 142-43.

<sup>347</sup> Glennon, *supra* note 70, at 100. Professor Glennon has long advocated use of the purse power to enforce the WPR. See *infra* note 348. The power is plenary, but not unlimited. Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 762-63 (1989).

are many.<sup>348</sup> As a "check" on brief military operations, the purse strings may not be effective, however. Presidents can circumvent the purse—perhaps not legally—by using creative funding techniques or proxies.<sup>349</sup> Experience has shown that even during longer military operations, partisanship can prevent effective use of the purse strings. Super-majority support is necessary to override a veto. In a few cases, congressional threats over money have forced a compromise.<sup>350</sup>

The Constitution provides for impeachment, but the process is exceedingly traumatic and cumbersome. Impeachment has never provided a viable way to check the President during periods of normalcy, let alone during national crisis. If President Andrew Johnson<sup>351</sup> could survive impeachment efforts based on abuse of presidential powers—as opposed to commission of actual crimes—nearly every President will be immune.

One check will be effective if it has broad public backing.<sup>352</sup> Sense of Congress declarations are nonbinding, but Congress can pass them rapidly by a simple majority vote. Congress can use these declarations in conjunction with strategies to marshal public support or in conjunction with its investigatory functions,<sup>353</sup> which rapidly focus public attention. Either way, Congress can generate significant political pressure on the President.

(b) *The Judiciary: A Non-Player by Choice.*—The courts have used their power of judicial review<sup>364</sup> too infrequently to affect the war powers arena significantly. Early judicial involvement resulted in few important decisions,<sup>355</sup> before the United States Supreme Court<sup>356</sup> announced the political question doctrine in

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<sup>348</sup> Fisher, *supra* note 347, at 758; King & Leavens, *supra* note 148, at 66–68; Michael J. Glennon, Strengthening the War Powers Resolution: *The Case for Purse Strings Restrictions*, 60 MINN. L. REV. 1, 28–38 (1975) (discussing methods of strengthening WPR with the purse strings). *Contra* TURNER, *supra* note 10, at 93–95; Hollander, *supra* note 130, at 60–63. *Cf.* Robbins, *supra* note 69, at 179–81; Orrin Hatch, What the Constitution Means by the Executive Power, 43 U. MIAMI L. REV. 197, 202–03 (1988) (discussing how Congress's use of the purse can lead to inconsistent and ambiguous foreign policies that are detrimental to national security interests and foreign relations).

<sup>349</sup> See, e.g., Fisher, *supra* note 347, at 764. See *supra* note 41.

<sup>350</sup> King & Leavens, *supra* note 148, at 68 n.61 (noting that despite a presidential veto, where there is no hope of an override, Congress's position can provide enough political pressure to bring the President to a compromised position).

<sup>351</sup> See generally EDWARD BOYKIN, CONGRESS AND THE CIVIL WAR 306–52 (1955).

<sup>352</sup> See HENKIN, *supra* note 10, at 86.

<sup>353</sup> Hollander, *supra* note 130, at 73–74.

<sup>354</sup> See generally HENKIN, *supra* note 10, at 208–16 (discussing judicial review as applied to foreign affairs).

<sup>355</sup> See *supra* notes 280–93 and accompanying text.

<sup>356</sup> Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

1829.<sup>357</sup> Since then, outside of the Civil War precedents,<sup>358</sup> scholars have relied on “assorted dicta from court opinions”<sup>359</sup> to find support for their views.<sup>360</sup> Occasionally, courts render decisions affecting the war powers while addressing completely different issues.<sup>361</sup> The traditional reluctance of courts to enter the war powers arena makes them an unreliable arbiter.<sup>362</sup>

### C. The Problem: Statutory Level

The WPR is “dead letter.”<sup>363</sup> It has not reestablished a war powers partnership. Many original supporters concede that the law is ineffective and should be repealed or radically amended. Moreover, Congress arguably has used the WPR for political purposes—to attack the policies of presidents from the minority party; or more commonly, to ensure that Congress will not be held accountable for military failure.<sup>364</sup> Theoretically, a vacillating President could use the WPR to shift responsibility for action or inaction to Congress.<sup>365</sup> More ominously, scholars have claimed that the WPR undermines the operational effectiveness and safety of our troops.<sup>366</sup> Adversaries must at least question our resolve to use force when Congress

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<sup>357</sup> See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 295-97 (1980) (arguing that courts should avoid adjudication because they lack institutional capability). *Contra* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989) (arguing that by abdicating judicial review role in separation of power cases, doctrine can lead to results that are opposite to its stated goals). See generally 1 STORY, *supra* note 94, § 374 (discussing origins of political question doctrine); Michael E. Tigar, *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. REV. 1135 (1970); Louis HENKIN, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976).

<sup>358</sup> KEYNES, *supra* note 113, at 101-07 (discussing Civil War cases in detail).

<sup>359</sup> Wald, *supra* note 63, at 1413.

<sup>360</sup> But by picking and choosing the right cases, one can support almost any view of the war powers. One commentator described this technique: “[c]ollecting and summarizing diverse, limited and sometimes petty constitutional and statutory authorities into undifferentiated, all-inclusive powers.” Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 477 (1976).

<sup>361</sup> See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

<sup>362</sup> Today courts are using a full range of “case or controversy” and prudential considerations to avoid adjudicating war powers cases. KEYNES, *supra* note 113, at 170. See *Dellums*, 752 F. Supp. 1141, 1152 (D.D.C. 1990); *Ange v. Bush*, 752 F. Supp. 509, 512, 515 (D.D.C. 1990); *Pietsch v. Bush*, 755 F. Supp. 62, 68 (E.D.N.Y. 1991). These most recent cases from Operation Desert Shield and Storm were avoided based on ripeness, political question/ripeness, and lack of standing, respectively.

<sup>363</sup> See *supra* notes 42-63 and accompanying text.

<sup>364</sup> TURNER, *supra* note 10, at 121-27 (citing and analyzing four cases in which congressmen have used WPR for political purposes).

<sup>365</sup> HENKIN, *supra* note 10, at 103.

<sup>366</sup> TURNER, *supra* note 10, at 129-33, 134-46 (including details of events leading up to the Beirut, Lebanon disaster and how WPR was directly involved).

debates the Commander-in-Chief's authority during a military crisis. The WPR is a problem because it does not work; but it also may be a problem simply because it exists.

#### *D. The Problem: Practical Level*

An effective war powers partnership is necessary for the twenty-first century. The Soviet Union's collapse may have actually increased global instability. The bipolar framework for military and political alliances is gone. Threats from unpredictable or unexpected sources will increase and will require immediate reaction.<sup>367</sup> Regional threats are now America's greatest concern,<sup>368</sup> and there is a likelihood of further balkanization<sup>369</sup> in the world. This creates the need to develop and continuously revise foreign policies that necessarily include use of force contingencies.

Using force to deter or contain communism generally was acceptable, for it was in our national interest to combat those who sought to destroy us. Building national consensus for using force to further less concrete interests will be difficult. America's policy-makers should not use the phrase "in the national interest" lightly or without a clear definition when justifying actions. In turn, Congress must have meaningful input into the continuing process of clarifying these "national interests." Congress will need strong presidential leadership to keep America on course, and the President will need congressional support to build consensus. Congress also will need an effective check on executive power to prevent any presidential drift into a "messianic foreign policy" mode.<sup>370</sup>

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<sup>367</sup> DOD ANNUAL REPORT, *supra* note 319, at 3.

<sup>368</sup> *Id.* at 7 (stating that "regional conflict has replaced global war as the major focus of defense planning").

<sup>369</sup> MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 192, 195, 224 (1991).

<sup>370</sup> Arthur M. Schlesinger, Jr., *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 72-73 (1987) (warning against what he terms "messianic foreign policy," where the United States begins to perceive its global mission as savior of all of "fallen humanity"; arguing that our eighteenth century Constitution will be over-matched by such a misguided foreign policy). Cf. DOD ANNUAL REPORT, *supra* note 319, at 33 (declaring specifically that it is not America's intention to seek to militarily enforce a *Pax Americana*).

But will America become a global policeman by way of the United Nations' collective security mechanism? Operation Desert Storm may portend the future. Apparently, two conflicting views exist concerning the status of providing American forces to the United Nations' Security Council for use in operations like Korea and Desert Storm. Compare TURNER, *supra* note 10, at 89-92 (forces furnished pursuant to article 43 of the Charter, which has never been implemented by domestic law, need not receive congressional approval by a declaration of war or otherwise) with Glennon, *supra* note 70, at 100-01 (forces furnished pursuant to article 43 of the Charter must be by written agreement with the Security Council and approved by Congress, as specified in the United Nations Participation Act).

With these challenges before them, the war power partners will have much to do. Specific roles exist for each partner to play, but the partnership will require cooperation. The goal must always be the development and execution of carefully considered, comprehensive, and consistent national security policies.

## VI. Recommendations: Where Do We Go From Here?

Professor Henkin accurately summarized the ultimate solution for the war powers dilemma when he stated: "The quest must be for more and better cooperation, consultation, accommodation, by better legislative-executive *modi vivendi et operandi*."<sup>371</sup> Many scholars echo this same idea.<sup>372</sup> The challenge is to get the political branches to stop struggling long enough to create a cooperative solution—not just a bipartisan solution, but a good faith compromise between the two branches.

### A. *The First Step: Preparing the Way*

The first step must be to repeal the WPR. This law is ineffective,<sup>373</sup> and the WPR does not comport with the original constitutional model.<sup>374</sup> Congress is not meaningfully involved in the decisional war powers.<sup>375</sup> The WPR will not prevent further presidential ascendancy. It has not made allowance for the contextual changes in which the war powers operate.<sup>376</sup> The WPR may actually undermine national security and could fail the nation in the twenty-first century.<sup>377</sup> Finally, the WPR's adversative nature discourages genuine presidential-congressional cooperation, which is undoubtedly its greatest deficiency.

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<sup>371</sup> HENKIN, *supra* note 10, at 279 (this essentially means ways of operating together).

<sup>372</sup> See generally TURNER, *supra* note 10, at 161–68; Biden & Ritch, *supra* note 32, at 410–12; W. TAYLOR REVELEY, III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 49 (1981) (describing cooperation as the constitutional system's "iron demand on the President and Congress"); WRIGHT, *supra* note 81, § 266 (quoting Lord John Russell's pointed insight: "[P]olitical constitutions in which different bodies share the supreme power are only enabled to exist by the forbearance of those among whom this power is distributed.").

<sup>373</sup> See *supra* notes 32–81 and accompanying text.

<sup>374</sup> See *supra* notes 98–293 and accompanying text.

<sup>375</sup> Of course this is only speaking from a theoretical standpoint, because WPR has never functioned properly. See *supra* notes 64–81 and accompanying text.

<sup>376</sup> See *supra* notes 295–97, 319–31 and accompanying text.

<sup>377</sup> See *supra* notes 332–70 and accompanying text.

### *B. The Second Step: Cooperation Through Compromise*

The second step toward solving the war powers dilemma must be to provide a viable alternative to the WPR.<sup>378</sup> To reach any compromise, both branches must understand their respective constitutional bargaining positions. To establish these respective positions, the branches should return to the constitutional basics represented by the original conceptual model.

**1. The Basis for Compromise.**—The basis for fixing the war powers should be the original conceptual model and the lessons gleaned from history, or our “experiences,” to use the framers’ own terminology. The model provides a constitutionally-based foundation; experience enhances the model by adding the “gloss which life has written.”<sup>379</sup> This experience presumptively reflects the most effectual means developed and proven by repetitious practice. Experience brings pragmatism to the theoretical. It represents an attempt to mold our eighteenth century Constitution into what it should be today.

Division of the war powers between the political branches along functional lines is just as valid today as it was in 1787, although the concept must be adapted to allow for modern military capabilities, the prevailing threat, and the changed relative strengths and

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<sup>378</sup> Some commentators have argued that legislation patterned after the WPR is not the answer. Cf. Richardson, *supra* note 78, at 738–39; Leigh, *supra* note 207 (manuscript unnumbered) (suggesting that each new administration make an informal agreement with Congress concerning consultation and reporting, procedures to be followed, and then have Congress enact this as a nonbinding, nonprecedent setting, concurrent resolution). See generally JOHN R. VILE, *REWRITING THE UNITED STATES CONSTITUTION* 5, 163–64 (1991) (discussing a related topic, the utility of extra-constitutional changes and reforms; arguing that formal amendment of the Constitution has proven too difficult and that congressional committee system, Congress’s rules and procedures, system of presidential staffing, and President’s cabinet all have and can be modified to address issues such as balance of power between executive and legislative branches).

<sup>379</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J.). This is Justice Frankfurter’s famous comment about how custom supplies meaning, if not substance, to the Constitution:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the *gloss which life has written* on them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive power” vested in the President by § 1 of Art. II.

weaknesses of the political branches. The President, through the development of the executive branch, has increased his ability to collect, analyze, and use national security information. By comparison, Congress has grown larger and more politicized. **This** growth has decreased Congress's ability to quickly evaluate information and make rapid decisions. The rapidity of warfare and the nature of the global threat from unpredictable sources renders the idea of a decisional war powers totally obsolete in certain urgent situations. Therefore, the President's operational war powers should be plenary for certain types of operations.

Since President Adams' quasi-war with France (1789-1801), American presidents have independently used military forces over two hundred times for a wide range of purposes that fall short of **all-out** armed conflict. The presidents did not seek congressional declarations of war. Significantly, these actions did not result in costly, long-term military involvements.<sup>380</sup> Presidents have committed United States forces for counterterrorist actions, actions to protect Americans and their property, evacuations of Americans and third-party nationals, peacekeeping efforts, policing efforts, airlifts, sea-lifts, freedom of navigation exercises, demonstrations of force, convoying operations, and others.

These lesser uses of force often went without congressional protest or even comment. When Congress protested, presidents have justified their actions with several novel constitutional theories and arguments.<sup>381</sup> The actual Commander-in-Chief clause provides the best justification because it represents the President's operational war powers. Where the risk of costly or long-term military involvement is minuscule and the benefits are clear, the Commander-in-Chief's powers should be plenary. Though these incidents may not be of constitutional **moment**,<sup>382</sup> this body of historic practice is strong evidence of how the war powers should actually work. Realities of national security and operational necessity constitute the important "gloss" of life.

One additional category of experience is relevant, and fortunately there are very few historical examples to cite.<sup>383</sup> At times

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<sup>380</sup> Pious, *supra* note 159, at 196.

<sup>381</sup> See *supra* notes 294-303 and accompanying text; see also *supra* note 135.

<sup>382</sup> See *supra* notes 260-60 and accompanying text.

<sup>383</sup> A few early court decisions interpreted the Commander-in-Chief power restrictively. The first example is found in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), a Supreme Court case previously discussed. See *supra* notes 286-88 and accompanying text. See also *Fleming v. Page*, 50 U.S. (9 How.) 603 (1860) (construing Commander-in-Chief clause narrowly to comprise "purely military" functions such as command of forces in the field); CORWIN, *supra* note 33, at 228-29 (discussing *Fleming* and noting that Commander-in-Chief clause did not expand in its meaning until the

Congress has unduly interfered with the Commander-in-Chief's freedom of action. Toward the end of the Vietnam War,<sup>384</sup> a reactionary Congress used its appropriations power clumsily and contributed to the unsatisfactory outcome.<sup>385</sup> With respect to the 1983-1984 Marine peacekeeping mission in Lebanon, a concerned Congress debated several ways to limit President Reagan's powers.<sup>386</sup> Eventually, Congress enacted a resolution authorizing the mission's continuance for up to eighteen months. Evidence exists, however, that the mixed signals sent by a vacillating Congress undermined the mission. (Congress gave the impression that it would remove the peacekeeping force if the safety of the Marines were further jeopardized). Ultimately, the lives of 241 Marines may have been needlessly lost in a barracks bombing—an attempt to force Congress to remove all the Marines by killing some.<sup>387</sup> Experience shows that national security interests are best served when the President's operational war powers are given wide latitude and support during military operations.

**2. The Compromise.**—After combining the original model with experience, what type of neo-conceptual model emerges? A partnership still exists, and to maximize institutional strengths and minimize weaknesses the functions still are divided. Instead of a persistently dominant Congress, predominance fluctuates depending on the type

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Civil War). This also explains *Brown*. The Commander-in-Chief's prosecution of modern warfare would be unduly restricted if these judicial interpretations were enforced.

In the ubiquitous *Youngstown* case, one troubling aspect is part of Justice Black's opinion, which apparently limits the Commander-in-Chief's broad powers to the "theater of war." Furthermore, he defines the "theater of war" using a simple geographic analysis, although he admits that what constitutes a "theater of war" is an expanding concept.

There are many differing views concerning the true import of *Youngstown*. The case has many interesting facets. Some scholars view it narrowly as a case which circumscribes the Commander-in-Chief power. Some scholars view it as a more fundamental limit on the chief executive's emergency powers. Others view it broadly as it pertains to Justice Jackson's description of fluctuating powers and his tripartite analysis. Because steel is such an essential component of military supply, whether or not Congress had spoken through legislation, the Court probably should have deferred to the presidential determination that a military emergency existed (unless the existing conditions contradicted such a finding). In view of the criticality of logistics to successful prosecution of war, Justice Black may have unduly restricted the President's Commander-in-Chief and/or emergency powers. *See generally* MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE—THE LIMITS ON PRESIDENTIAL POWER* (1977); HENKIN, *supra* note 10, at 307 n.45.

<sup>384</sup> *See supra* notes 346-47 and accompanying text.

<sup>385</sup> *See* TURNER, *supra* note 10, at 29-33; Moore, *supra* note 63, at 142-43.

<sup>386</sup> Apparently the consultation with Congress prior to the initial deployment had been proper and the Commander-in-Chief had sent formal reports to both houses, although they did not fully comply with the WPR requirements. TURNER, *supra* note 10, at 138.

<sup>387</sup> *Id.* at 141-44.

of military operation and the phase of the operation. Congress must relinquish the decisional war powers to the President for urgent, limited purpose operations. For less urgent operations, Congress exercises its normal decisional war powers in a conclusive, meaningful way' before the hostilities begin. Once Congress decides to use force, the Commander-in-Chief's operational war powers should predominate.

This approach provides the potential for compromise and an invitation for cooperation. It requires Congress to recognize that the President must exercise the total war powers in many instances. Congressional involvement would depend on the degree of urgency and risk involved in the specific operation. Congress should concede this to the President, because Congress institutionally is incapable of providing meaningful input in urgent situations. Congress also would have to recognize that after it rationally exercises its decisional war powers, the President's operational war powers must be unfettered.

Conversely, the President would have to recognize and accommodate Congress's war powers—the constitutional right to exercise decisional war powers during the earliest phases of potentially high-cost, long-term operations of little—or ambiguous—benefit. The President should concede this, because Congress is the decision-making body that is representative of the true sovereign—the people. If Congress and the President bring such realistic, compromising attitudes together, they can fix the war powers.

Institutional self-interest also would play a role. Congress would have to recognize the existing, albeit skewed, balance of power. However, Congress would be surrendering a relatively inconsequential portion of the decisional war powers to regain the consequential part. Based on the original conceptual model and idea of fluctuating powers, the President ought to compromise, because Congress is constitutionally capable of recapturing a much greater share of the war powers.<sup>388</sup>

### *C. Specific Recommendations*

Any future war powers arrangement must incorporate three general concepts: first, a continuum of congressional involvement; second, maximization of the Commander-in-Chief's operational war powers once released; and third, a dispute resolution mechanism.

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<sup>388</sup> Congressional leaders have proposed amendments to the WPR, or replacements to the WPR, which incorporate procedures to clear the way for judicial review of the legislation. If Congress ever adopts these amendments, the consequent judicial showdown could result in devastation for the President's war powers, given his constitutionally weak position vis-a-vis Congress. See *supra* notes 264–60 and accompanying text; see also *supra* note 303; see *infra* note 398.

1. *Continuum of Involvement*.—Creating a continuum of congressional involvement<sup>389</sup> simply means establishing different levels of legislative interaction. The degree of involvement would depend on three variables: the degree of urgency; the degree of risk to the nation (the potential costs); and the objectives pursued through the use of force (the potential benefits). In structuring the appropriate level of congressional involvement for each category of military operations, the decision-makers should consider all three variables. The degree of urgency is a threshold variable, however, and is entitled to the greatest weight in most cases. Beyond the threshold, the need to consider and balance the potential costs and benefits against each other necessitates some level of congressional involvement.

Congressional involvement in light of these three variables would be as follows.<sup>390</sup> As the degree of urgency increases, the realistic possibility for meaningful congressional involvement decreases. The President's war powers become increasingly plenary in such situations. To the extent that time permits any rational decision-making, however, Congress is generally the proper body to consider and balance the national costs and benefits. For Americans, the most essential aspects of cost are the number of American casualties and the duration of the operation.<sup>391</sup> As the potential costs increase, congressional involvement also should increase because national resources are at risk, and the most representative branch must have considerable input.

The variable of "benefits" is the most difficult to articulate. The phrase "in the national interest" is inherently *ambiguous*,<sup>392</sup>

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<sup>389</sup> Professor Henkin alludes to this concept while commenting on foreign policy when he states:

Congress's part cannot be equal to the President's but the constitutional conception . . . suggests that the degree and kind of Congressional participation should increase *as* the means of foreign policy begin to include uses of force and to approach a national commitment to war, and *as* the cost of policy begins to loom large in the competition for national resources.

HENKIN, *supra* note 10, at 279-80.

Many commentators have proposed various ways to achieve less than full congressional participation. *See generally* Robbins, *supra* note 69, at 182 (proposing a joint select war powers committee); Moore, *supra* note 63, at 152-53. *Cf.* Biden & Ritch, *supra* note 32, at 402 (mentioning "consultative group" proposed in Byrd-Warner bill). *Contra* TURNER, *supra* note 10, at 149-50 (discussing problems with concept of a consultative group taken from legislative branch).

<sup>390</sup> *See infra* Appendix C (chart, "Three Variables").

<sup>391</sup> LORELL & KELLEY, *supra* note 10, at 84-85. These two aspects often are related, because the total casualties may depend on the duration of the operation.

<sup>392</sup> *See generally* JOSEPH FRANKEL, NATIONAL INTEREST (1970) (arguing that the term is vague and undefined and that no commonly accepted criteria exists by which to define the term). Those national interests relating to national survival are the "vital" or "core" interests, and lesser interests are not well defined. *Id.* at 73.

and Congress should have a significant role in clarifying this ambiguity.<sup>393</sup> This clarification must occur outside the context of a national security crisis. As the potential benefits increase, congressional involvement may decrease, because the President can assume broad, unified support.

**2. Freeing the *Commander-in-Chief*.**—While the zenith of congressional power is during the decisional phase,<sup>394</sup> the apex of the President's power is during the operational phase.<sup>395</sup> The original model established this functional division. Historically, congressional interference with the Commander-in-Chief's war powers has been in reaction to perceived presidential usurpation of Congress's own war powers. Therefore, fixing the war powers to clearly reestablish the functional division of power—if both partners will adhere to their proper roles—solves this problem. Any war powers solution must provide a clear understanding of, and insure mutual respect for,<sup>396</sup> the respective roles of the partners. During military operations, Congress must not interfere with the President's freedom of action. The proper time for Congress to exercise power is before unchaining the “dog of war.”<sup>397</sup>

**3. Providing a Conflict Resolution Mechanism.**—Any war powers solution requires a method to resolve differences between the partners. The entire war powers mechanism has suffered too long because it lacks such a nonpoliticized final arbiter. Issues resurface and never are finally resolved. Neither partner feels bound by the acts, claims, or theories of the other.

Creating procedures to ensure judicial review may not be the

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<sup>393</sup> See *supra* notes 369–71 and accompanying text.

<sup>394</sup> But see HENKIN, *supra* note 10, at 107–08 (arguing that Congress can terminate war it has expressly or implicitly authorized; arguing Congress can “control the conduct of war” and make decisions about the geographic scope of war—or whether to release nuclear weapons). *Id.* at 361 n.48, 351–52 n.49. Cf. KEYNES, *supra* note 113, at 166.

<sup>395</sup> TURNER, *supra* note 10, at 69–60 (citing Jonathan Dayton, the youngest framer, whose understanding was that the Commander-in-Chief clause afforded the President maximum operational discretion during military operations, independent of whether Congress used its decisional war powers, and that specific legislative direction on such matters would set a “dangerous precedent”; troubling language was stricken from the proposed enactment before passage).

<sup>396</sup> See WRIGHT, *supra* note 81, § 249 (presenting view of the constitutional understanding when executive-legislative cooperation is necessary for an act: “the advice of that . . . [other branch] . . . ought to be sought before the action is taken, but where such action has already been taken the . . . [other branch] . . . ought to perform the necessary acts.”). Although the executive branch should be free to exercise its operational war powers, Congress's response to suspected abuse or improprieties should be its broad investigatory powers, not interference with operations.

<sup>397</sup> See *supra* note 149.

best solution.<sup>398</sup> Courts consistently have refused to decide war power issues based on a self-admitted lack of expertise and a belief that the political branches should make such policy decisions.<sup>399</sup> Undoubtedly there is some wisdom in this position. Judicial opinions tend to be narrowly drawn<sup>400</sup> and untimely, because the courts receive the intractable issue after the problem arises.

An informal conflict resolution mechanism may provide a preferable alternative.<sup>401</sup> There is greater flexibility in structuring the actual composition of the resolving body. There would be greater security if the issues involve sensitive national security situations or information. A mechanism to force the two branches to negotiate and definitively resolve their differences is essential. Ultimately, this is the type of cooperative "struggle" envisioned by the framers and is consistent with the methodology of negotiation and compromise used throughout our government. Whether by court decision or informal mechanism, any remedy must provide an effective and

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<sup>398</sup> Numerous proponents exist for amending the WPR (or any legislative alternative) to ensure judicial review. See Glennon, *supra* note 70, at 99; Glennon, *supra* note 61, at 578-80; Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 766 (concluding that in an impasse, only courts can effectuate resolution); Biden & Ritch, *supra* note 32, at 408-10.

The respective arguments are summarized in KEYNES, *supra* note 113, at 62-67. The analysis shows that several distinct categories of legal issues surrounding the war powers exist. The most important constitutional issues involving the fundamental separation of power are unlikely to be resolved by the courts due to practical considerations. Notwithstanding the conceptual war powers model present here, courts historically use judicial avoidance mechanisms to abdicate their judicial review function. *Id.* at 91-92, 113. Even Justice Jackson recognized that "any actual test of power is likely to depend on the imperative of events and contemporary imponderables rather than abstract theories of law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Resolution of these constitutional issues probably would conclude the matter, but danger arises if judicial review is actually sought and obtained, because the "imponderable" may dictate the decision. If history is instructive, bad law often results from a military crisis. See, e.g., *Civil War Cases* and more recently *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

The category of war power issues addressed by most commentators involves construction and implementation of the WPR itself. Amendments could create a judicially enforceable WPR, but the danger is that a decision could effectively make foreign policy. See KEYNES, *supra* note 113, at 170-72. Limited judicial review for the sole purpose of forcing joint decision-making is not problematic. Cf. Ely, *supra* note 49, at 1406-17 (discussing how to get around various tools of judicial abstention, but suggesting judicial review only for limited purpose of "triggering" WPR, thereby returning ultimate issue resolution to political branches).

<sup>399</sup> E.g., *Conyers v. Reagan*, 578 F. Supp. 324, 327 (D.D.C. 1984).

<sup>400</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.")

<sup>401</sup> See generally Leigh, *supra* note 207 (manuscript unnumbered); WRIGHT, *supra* note 81, §§ 244, 266 (referencing need for effective constitutional understanding in area of foreign affairs, especially on separation of powers issues).

timely way to resolve disagreements with a finality that binds the two political branches.

## VII. Conclusion

The fifty-five men who drafted our Constitution certainly earned an appropriate title—framers. They gave us the framework for a great nation. But using their work is not always easy, especially in the area of foreign relations. As Professor Henkin notes:

How well the blueprint was conceived is still debated almost two centuries later, and how well the machine has worked is a living issue. Perhaps the “contraption” was doomed to troubles from the beginning, for while the Fathers ended the chaos of diplomacy by Congress and of state adventurism, the web of authority they created, from fear of too-much government and through contemporary political compromise, virtually elevated inefficiency and controversy to the plane of principle . . . .<sup>402</sup>

Often Americans give these men too much credit, for as Justice Jackson lamented in *Youngstown Sheet & Tube Company*, “[j] what our forefathers did envision . . . , must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>403</sup> There is a real substance to their “blueprint,” but usually it takes time to uncover. This article demonstrates how one can do intensive research on an extremely narrow area of constitutional law and still glean very little from the framers’ handiwork.

Today’s governing officials must overcome the urge to exploit the framers’ vagaries in order to make quick and easy modifications to America’s supreme law. If the original conceptual models have been proven unworkable, Americans should openly recognize this and move toward effective solutions. Arguing that the framers really did not mean what they said, or that longstanding practices serve to alter the Constitution, is disingenuous and injurious. The war powers arena suffers from these vices.

Congress’s first attempt to **fix** the war powers—the WPR—has failed. What lies ahead largely depends on Congress’s ability to overcome its institutional indifference to the war powers challenge. As long as America has a Constitution, no remedy will work unless that remedy returns to the constitutional basics—the “intent of the

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<sup>402</sup>HENKIN, *supra* note 10, at 34.

<sup>403</sup>*Youngstown*, 343 U.S. at 634.

framers.” This requires good faith compromises and cooperation by the war power partners. The alternative is to continue on their increasingly separate paths with an executive that is ascendant. Realistically, few care about the growing constitutional imbalance. But more should care about the practical problems that this separation portends for managing foreign relations in the twenty-first century. The considerations are twofold: the constitutional and the practical. The recommended basis for fixing the war powers presented in this article reflects the same two considerations: integration of the original conceptual model for the war powers—the constitutional—with workable practices that are within the model’s parameters—the practical. America should not wait to experience another Vietnam War or another “Imperial President”<sup>404</sup> before fixing its war powers.

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<sup>404</sup>See *supra* note 26.

# APPENDIX A

## EXPRESS AND ANCILLARY GRANTS OF POWER

### Express Grants

#### *Congress (Article I)*

§ 8, cl. 11. [The Congress shall have the . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

#### *~~Executive~~ (Article II)*

§ 2, cl. 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

### Ancillary Grants

§ 8, cl. 12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

§ 3. He shall . . . Commission all the Officers of the United States.

§ 8, cl. 13. To provide and maintain a Navy;

§ 8, cl. 14. To make Rules for the Government and Regulation of the land and naval Forces;

§ 8, cl. 15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

§ 8, cl. 16. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ;

# APPENDIX B

## GENERAL POWER STRUCTURE

### Domestic Affairs

#### *Congress (Article I)*

§ 8, cl. 1. [The Congress shall have Power To . . .] provide for the common Defence and general Welfare of the United States;

§ 8, cl. 18. . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

#### *Executive (Article II)*

§ 1, cl. 1. The executive Power shall be vested in a President of the United States of America.

§ 3. [H]e shall take Care that the Laws be faithfully executed . . . .

Power to Propose policies and laws:

§ 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient;

### Treaties

#### *(Article II, 2, cl. 2)*

#### *Senate*

[The President has the power] by and with the Advice and Consent of the Senate [to make treaties], provided two thirds of the Senators present concur [in the concluded treaty] . . . .

#### *Executive*

He shall have Power . . . to make Treaties . . . .

Power to Propose treaties:

Implicit in the President's functions as head of state and in his control of the apparatus of foreign relations.

## War Powers

**Congress**

§ 8, cl. 11. To declare War, grant Letter of Marque and Reprisal, and make Rules concerning Captures of Land and Water;

**Executive**

§ 2, cl. 1. The President shall be Commander in Chief of the **Army** and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

Power to Propose war:

Implicit in the President's function as Commander in Chief and in his control of the apparatus of foreign relations.

**APPENDIX C****THREE VARIABLES**

No Congressional Involvement (E.g., mere notifications to Congressional leadership)

Partial Congressional Involvement (E.g., meaningful consultation with standing select committees, small consultative groups, or involvement through a restructuring of the President's advisory staff)

Full Congressional Involvement

DEGREE OF URGENCY

*Mayaguez Rescue - Bombing of Libya - Cuban Missile Crisis - Lebanon*

Operational Emergencies (E.g., increasing, unpredictable threats; limited window of opportunity for conducting operations)	Routine Contingencies (E.g., static, known threats; timely response is necessary for impact or other national security reason)	Anticipatory Contingencies (E.g., operations in anticipation of threats or in the face of materializing threats)
Partial Congressional Involvement		Full Congressional Involvement

DEGREE OF RISK  
(COSTS)

*Honduran Assistance - Grenada - Panama - SWA - Korea - Vietnam*

Quasi-Military Operations	Low Intensity Operations	Mid-Intensity Operations	High-Intensity Operations	Global War
Partial Congressional Involvement			Full Congressional Involvement	

PURPOSES FOR THE USE OF FORCE  
(BENEFITS)

<i>Civil War -</i>		<i>World War II - Desert Storm</i>			
National Survival	Protection of Americans Abroad	Furtherance of National Security Objectives	Defense of an Ally Pursuant to a Collective Security Arrangement	Furtherance of Economic Interests	Furtherance of General Global Security

# THE TWENTY-SECOND ANNUAL KENNETH J. HODSON LECTURE: UNCHARGED MISCONDUCT EVIDENCE IN SEX CRIME CASES: REASSESSING THE RULE OF EXCLUSION\*

ROGER C. PARK\*\* AND DAVID P. BRYDEN\*\*\*

## I. Introduction

The restrictions on use of uncharged misconduct against the accused raise vexing problems in sex offense cases, ones that Congress is now in the process of addressing. Public awareness of the problems was heightened by the televised trial of William Kennedy Smith. He was accused of raping a woman whom he met in a bar in Palm Beach. She had gone with him back to the vacation house at which he was staying, and the two went for a walk along the beach. She testified that he took off his clothes, tackled her when she tried to leave, and raped her. He admitted having intercourse but claimed that she consented, and that she started to behave irrationally when he called her by the wrong name. At a pretrial hearing, the prosecution offered testimony by three other women that they had been sexually assaulted by Smith.<sup>1</sup> The trial judge excluded the evidence

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<sup>1</sup> In two cases, the women reported that Smith suddenly became aggressive and pinned them down and pawed them, but that they were able to repulse him. A third reported that while she was intoxicated and sleeping on his bed during a party in his apartment, he made sexual advances, and even though she said no and tried to fight him off, he forced her to have intercourse with him. Larry Tye et al., *Alleged Assaults by Smith Described: Accounts by 3 Women are Similar to charges in Palm Spring Rape case*, BOSTON GLOBE, July 24, 1991, at 1.

under Florida law, and Smith ultimately was acquitted.<sup>2</sup> Although there is a division of authority on the issue, exclusion of evidence about Smith's alleged prior crimes was consistent with Florida law and with the law of many, but not all, jurisdictions.<sup>3</sup>

The same issue often arises in "stranger rape" cases, where the defendant claims that he was misidentified by the victim and the prosecution seeks to introduce evidence that he committed other rapes. Here too, the uncharged misconduct evidence is sometimes excluded as contrary to the character evidence rule,<sup>4</sup> though some courts have been more ready to admit the evidence than they are in consent defense cases.<sup>5</sup>

<sup>2</sup>See Michael Hedges, *Other Women Paint Smith as Violent, 'Not Ibo Bright'*, WASH. TIMES, Dec. 7, 1991, at A4 (describing exclusion of evidence); Paul Richter, *Jury Acquits Smith of Rape at Kennedy Estate*, L.A. TIMES, Dec. 12, 1991, at A1 (describing acquittal).

<sup>3</sup>See *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948) (defendant accused of rape of acquaintance after driving her to remote part of federal base; rape 15 days earlier on same base excluded; court states that fact that one woman was raped had no tendency to prove that another woman did not consent); *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (see *infra* text accompanying note 41) (error, though harmless, to admit evidence of two prior rapes by defendant charged with acquaintance rape); *Reichard v. State*, 510 N.E.2d 163, 165 (Ind. 1987) (defendant accused of knife-point rape of woman with whom he had a dating relationship; held, reversible error to receive evidence of "prior alleged rapes perpetrated by him upon various individuals"; court remarks that "the trial court incorrectly categorized rape of an adult woman as depraved sexual conduct"); *Brown v. State*, 459 N.E.2d 376, 378-79 (Ind. 1984) (defendant met victim in gas station, drove her to cornfield where he threatened, raped, and beat victim; two other victims testified to rapes by defendant in secluded areas after getting or giving him rides in vehicle; held, receiving evidence was reversible error; court indicates that evidence might be admissible were identity in issue, but holds that it is not admissible in case at bar because defense is consent; court also distinguishes depraved sexual instinct cases involving children); *State v. Saltarelli*, 655 P.2d 697, 700-01 (Wash. 1982) (defendant, charged with rape of acquaintance, raised consent defense; held, reversible error to receive evidence of defendant's prior attempted rape of a different woman). But see *State v. Crocker*, 409 N.W.2d 840 (Minn. 1987) (not error to admit evidence of prior sex crimes against children in case where defendant raises consent defense in response to accusation of rape of adult victim; evidence shows a "pattern" of opportunistic assaults on vulnerable victims).

<sup>4</sup>See, e.g., *Vaughn v. State*, 604 So. 2d 1272, 1273 (Fla. Dist. Ct. App. 1992) (defendant accused of rape of sixty-year-old victim whom he had awakened in her bedroom; evidence of prior rape of prostitute in alley excluded); *People v. Sanza*, 609 N.Y.S.2d 311, 314-15 (N.Y. App. Div. 1986) (in prosecution for rape-murder in New York State, evidence that accused had raped three victims in Florida inadmissible); *White v. Commonwealth*, 388 S.E.2d 645, 649 (Va. Ct. App. 1990) (defendant accused of raping woman in women's rest room; evidence that three hours earlier defendant had approached another woman, knife in hand, in another women's rest room inadmissible).

<sup>5</sup>Some of the courts that have rejected the evidence in consent-defense cases have indicated in dictum that they would accept it in alibi-defense cases because of its relevance to identity. See *Tassell*, 679 P.2d at 1; *Brown*, 459 N.E.2d at 378-79. Other courts have held prior sex crime evidence admissible in cases in which identity is in issue without making an explicit comparison to consent-defense cases. See, e.g., *Cope-*

A third type of case involves child sex abuse. Again, there is no defense of consent. The defendant may or may not have been an acquaintance of the alleged victim. The defense may claim that no sexual abuse occurred, or that it was committed by another person. The prosecution offers evidence that on other occasions the accused molested the same child or other children. Courts often admit this type of evidence, though there are still a number of courts that exclude it.<sup>6</sup>

Courts excluding evidence in these three categories have rejected it under the traditional rule—now embodied in Rule 404 of the Federal *Rules of Evidence*—that prohibits using conduct to show character in order to show action in conformity with character. We will start with an examination of this body of law, and then turn to an assessment of possible reforms.

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land v. State, 455 S.2d 951, 954–55 (Ala. Crim. App. 1984) (prior rape and charged rape sufficiently similar to meet admissibility standard for establishing identity where both incidents occurred in the same neighborhood, attacks were late at night, muscular attacker entered homes by breaking window, wore a mask, brandished a weapon, and smelled bad), *cert. denied*, 455 So. 2d 956 (Ala. 1984); Humphrey v. State, 304 S. 2d 617, 618, 622 (Ala. Crim. App. 1974) (similarity linking two rapes and one attempted rape was that the attacker walked unarmed into the victim's bedrooms to attack them; held, evidence admissible to prove identity); Coleman v. State, 621 P.2d 869, 875 (Alaska 1980) (similarities in race and age of victims, along with similar situs of attack and manner of subduing victim from behind sufficiently like prior rape to allow evidence of that crime to prove identity), *cert. denied*, 454 U.S. 1090 (1981); Jenkins v. State, 356 S.E.2d 525, 526 (Ga. Ct. App. 1987) (evidence of defendant's prior sexual assault admissible to establish identity for attempted rape charge where there is no dispute that defendant committed prior assault, and both prior assault and charged crime involved sexual assault upon woman who had no prior personal connection with defendant and who frustrated assault by screaming); State v. Hanks, 694 P.2d 407 (Kan. 1985) (defendant accused of raping victim while wearing a ski mask; held, evidence of three other rapes, in which defendant had used threats, violence, and had wielded a knife, though not wearing a mask, sufficiently similar to be admitted for the purpose of establishing the rapist's identity). *Cf.* State v. Mason, 827 P.2d 748 (Kan. 1992) (defendant accused of attempted rape of 89-year-old victim; held, evidence of prior murder of 76-year-old victim, where defendant asked to use the phone to gain entry and strangled victim with sock, was sufficiently similar to charged crime in which person gained entry to home by asking to use the phone and prepared stocking in his hands before fleeing victim's house to be admissible to establish identity).

<sup>6</sup>Cases admitting the evidence include: State v. Miller, 632 P.2d 552, 554–55 (Ariz. 1981) (evidence of prior molestation of another child victim was admissible to prove identity where victim in charged crime was unable to identify defendant, where both incidents were similar in that they occurred at the same time of day, man bore same description, and both children were fondled in the same way after man broke into residence through a bedroom window); Hall v. State, 419 S.E.2d 503, 505 (Ga. Ct. App. 1992) (in defendant's trial for molestation of his teenage daughter, testimony that 16 years earlier defendant had molested his teenage sister was admissible, even though his sister alleged penetration whereas his daughter did not, and daughter alleged continuing contacts whereas his sister alleged only one incident); State v. Floody, 481 N.W.2d 242, 254 (S.D. 1992) (in prosecution for rape of six-year-old, evidence of other sexual contact between defendant and victim when parents of victim left the house admissible to show plan or course of criminal activity).

Cases excluding the evidence include: Government of Virgin Islands v. Pinney,

## 11. Existing Law

### *A. Uncharged Misconduct Offered to Show Something Other Than Character: Rule 404(b) Evidence*

This rule against character evidence does not prohibit all use of other crimes or wrongs (uncharged misconduct) to prove that the defendant committed the crime charged. The rule only prohibits a certain type of *reasoning* about uncharged misconduct—reasoning that involves inferring bad character from bad acts, and then inferring guilt of the crime charged from the bad character. Evidence of uncharged misconduct is admissible to show guilt if an inference about guilt can be made without relying upon character reasoning.

Rule 404(b) gives examples of purposes for which evidence may be received without running afoul of the rule against character reasoning. It is a familiar list, for which one acronym is KIPPOMIA,<sup>7</sup> permitting reception of the evidence for purposes such as showing knowledge, identity, plan, preparation, opportunity, motive, intent, or absence of mistake or accident.<sup>8</sup>

Occasionally, applying the rule is easy because the uncharged misconduct evidence genuinely does not require the trier of fact to make any inference about disposition or propensity at all. Suppose, for example, that the defendant is accused of growing marijuana in his back yard. He claims that he thought the plants were just ordi-

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967 F.2d 912 (3d Cir. 1992)(in prosecution of 18-year-old defendant for rape of seven-year-old girl, receiving testimony of victim's sister that she also had been raped by accused ~~six~~ years earlier, when she was ~~six~~, was reversible error); *Bolden v. Alaska*, 720 P.2d 957 (Alaska Ct. App. 1986)(defendant accused of sexual conduct with two underage girls, one of them his daughter; held, reversible error to admit evidence of defendant's sexual conduct with other daughters and their underage friends; court notes that identity and intent are not in issue, the only defense being that the acts were not committed); *People v. Woltz*, 592 N.E.2d 1182 (Ill. App. Ct. 1992)(defendant accused of digital penetration and other forcible touching of 12-year-old girl; prior forcible rape of 14-year-old inadmissible); *People v. Ponce de Leon Jones*, 335 N.W.2d 465, 466 (Mich. 1983) (the accused was charged with a crime arising from sexual intercourse with his 15-year-old stepdaughter; held, reversible error to admit testimony by his natural daughter and by another stepdaughter of sexual activity with them); *Kelly v. Texas*, 828 S.W.2d 162 (Tex. Crim. App. 1992)(defendant charged with sexual assault on nine-year-old girl; reversible error to admit testimony by nine-year-old witness who was friend of complainant about other acts with complainant and about acts with witness); *Owens v. State*, 827 S.W.2d 911 (Tex. Crim. App. 1992) (reversible error in prosecution for sexual assault of defendant's daughter to admit testimony of the defendant's alleged rape of his older daughter); *State v. Winget*, 310 P.2d 738, 738-39 (Utah 1957) (defendant was accused of sexual abuse of his eight-year-old daughter; held, reversible error to allow his 17-year-old stepdaughter to testify that she had been abused by him as a child).

<sup>7</sup> The acronym is suggested in H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 877 (1982).

<sup>8</sup> See FED. R. EVID. 404(b).

nary weeds. To show his knowledge that the plants were marijuana, the prosecutor would be allowed to put in evidence that the defendant previously had been convicted of growing marijuana. The evidence would not be offered to show that the defendant had the character of being a drug dealer, but merely to show that he knew what marijuana looked like. **This** example does not require us to infer anything at all about any personality disposition of the defendant.

The use of uncharged misconduct evidence under Rule 404(b) usually does involve to some degree, however, an inference about a personal propensity of the defendant, in the sense of a tendency by the defendant to act similarly in similar situations. This is almost always the way the evidence is used when the defendant is charged with sexual assault or child abuse.

We will consider the 404(b) exceptions,<sup>9</sup> and how they are used in sex crime cases. Of the exceptions specifically listed, only "motive," "intent/absence of mistake," "plan," and "identity" arise with frequency in sex crime cases.

*I. Motive.*—We will start with "motive"—that is, evidence about the state of mind or emotion that influenced the defendant to desire the result of the charged crime. Uncharged misconduct evidence can show motive in one of two ways.<sup>10</sup> First, the uncharged misconduct can *cause* the motive to arise. For example, suppose that the uncharged crime is robbery, and the charged crime is murder. The prosecution's theory is that the defendant murdered the victim because the victim was a witness to the robbery. The robbery gives rise to the motive for the murder. Admission of uncharged misconduct evidence does not require the trier of fact to infer that the defendant had a violent character, but only to infer that the defendant had a reason to want to commit the crime. Use of uncharged misconduct evidence to show motive is not controversial in this situation.

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<sup>9</sup>Though some evidence experts might prefer to describe Rule 404(b) evidence as evidence that falls outside the rule against character reasoning, rather than an "exception" to the rule, we have for the sake of verbal economy referred to this sort of use as an "exception." See CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., 22 FEDERAL PRACTICE AND PROCEDURE § 5240, at 469 (1978) (same usage). In fact, the "exception" language may be a correct characterization, even as a technical matter, of the results reached in much of the case law. For example, the cases in which other crimes evidence is used to show intent are often ones that permit an inference of intent by means of an inference that the defendant had a propensity to commit the crime charged, thus, in effect, making cases in which intent is in issue an exception to rule against character reasoning, rather than an example of a use that does not involve character reasoning.

<sup>10</sup>See EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE § 3:15 (1984). Cf. 22 WRIGHT & GRAHAM, *supra* note 9, § 5140, at 481.

Second, the uncharged misconduct can be evidence of a pre-existing motive that caused both the uncharged act and the charged crime. For example, suppose that the defendant is charged with the murder of Mr. X. On a prior occasion, the defendant vandalized Mr. X's car. The vandalism would be admissible on the theory that it manifests hatred for Mr. X, and that the hatred is the motive for the murder.<sup>11</sup>

Commentators have criticized the reception of this second type of motive evidence on grounds that receiving it is just another way of letting in propensity evidence<sup>12</sup>—but admitting it is consistent with a fair interpretation of the rule against using character to prove conduct. It is intelligible to say that a defendant hates a particular individual, without necessarily saying that the defendant has the character of being a hater. The word “character” carries a connotation of an enduring general propensity, as opposed to a situationally specific emotion.

In child sex abuse cases, evidence that the defendant previously abused the same child often is admitted to show that the defendant was motivated by a lustful desire for that particular child.<sup>13</sup> This use of motive evidence in sex crime cases is analogous to the use of evidence of crimes against the same person in other contexts, such as the use of vandalism to show the defendant's hatred for Mr. X. However, courts sometimes give the motive concept astonishing breadth in child sex abuse cases. For example, the Supreme Court of Iowa has stated that evidence of uncharged acts against other adolescent girls was admissible in a sex crime case, as the evidence showed the defendant's motive “to gratify lustful desire by grabbing or fondling young girls.”<sup>14</sup> That reasoning has been compared to saying, in a burglary case, that other acts of thievery show a “desire to satisfy his greedy nature by grabbing other people's belongings.”<sup>15</sup> In either case nothing of the rule against

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<sup>11</sup> See, e.g., *State v. Green*, 652 P.2d 697, 701 (Kan. 1982) (prior assaults on wife admissible to show defendant's motive for murdering her).

<sup>12</sup> RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 226 (2d ed. 1982).

<sup>13</sup> See *Padgett v. State*, 551 So. 2d 1259 (Fla. App. 5th 1989) (evidence of defendant's prior sexual assaults against victim was admissible to show his “lustful attitude” toward the victim); *State v. Scott*, 828 P.2d 958 (N.M. App. 1991) (evidence of defendant's repeated fondling and sexual intercourse with victim for ten years prior to the charged crime was properly admitted to show defendant's “lewd and lascivious” disposition towards the victim); *State v. Ferguson*, 667 P.2d 68 (Wash. 1983) (evidence of photographs showing that defendant made the child victim put her mouth on his penis was admissible to prove a lustful disposition towards the child).

<sup>14</sup> *State v. Schlak*, 111 N.W.2d 289 (Iowa 1961) (dicta; conviction reversed because trial judge admitted act too remote in time).

<sup>15</sup> “One wonders whether the Iowa court would have condoned the admission of evidence of other thefts in a trial for theft on the grounds that it showed the

character reasoning remains, because it is a trait of character that supplies the motive.

This type of reasoning seems to have greater appeal in child sex abuse cases<sup>16</sup> than in adult rape cases.<sup>17</sup> In either case, no real need to explain motive exists. Motive may be a mystery in a murder case, but not in a sex crime case. Courts that admit the evidence of acts against third parties on a motive theory are really using “motive” as a euphemism for “character.”

**2. Plan.**—Under Rule 404(b), evidence also is admissible to prove “plan.” That sounds reasonable. Inferring that someone had a “plan” is different from inferring that the person had a trait of character. The concept of “plan,” however, has proven to be as protean as the concept of “motive.”

The concept can refer to a plan conceived by the defendant in which the commission of the uncharged crime is a means by which the defendant prepares for the commission of another crime, as in Wigmore’s example of stealing a key in order to rob a till.<sup>18</sup> Or it can refer to a pattern of crime, envisioned by the defendant as a coherent whole, in which the defendant achieves an ultimate goal through a series of related crimes. For example, in the movie *Kind Hearts*

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defendant’s ‘desire to satisfy his greedy nature by grabbing other people’s belongings.’” LEMPERT & SALTZBURG, *supra* note 12, at 230.

<sup>16</sup>See *United States v. Herbert*, 35 M.J. 266 (C.M.A. 1992) (defendant charged with crime arising from oral sex with adolescent stepson; held, not abuse of discretion to admit evidence of attempt to fondle one nephew and oral sex with another; though showing of desire for sexual gratification is not element of crime charged, “[e]vidence of a specific state of mind on the part of an accused on occasions prior to charged acts may be admissible to show circumstantially that the charged acts later occurred as an expression of or outlet for this mental state . . . . Here, appellant’s nephews testified to his sexual acts or attempted sexual acts with both of them which indicated his peculiar incestual interest for young boy family members”); *State v. Friedrich*, 398 N.W.2d 763, 772 (Wis. 1987) (defendant raised alibi defense in response to charge of sexual contact with 14-year-old niece who was babysitting for his children, claiming he was working at time of charged acts; prior sexual touching of victim and of another young girl admissible to show motive of obtaining sexual gratification, an element of the offense; alternatively, admissible as evidence of plan, because defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship); *Elliott v. State*, 600 P.2d 1044 (Wyo. 1979) (prior acts of child sex abuse admissible to show “motive”).

<sup>17</sup>See, e.g., *State v. Saltarelli*, 655 P.2d at 700 (“It is by no means clear how an assault on a woman could be a motive or inducement for defendant’s rape of a different woman almost five years later . . . . [T]he evidence seems to achieve no more than to show a general propensity to rape, precisely forbidden by ER 404(b)’”); *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (prior rapes inadmissible; motive theory not pursued). But see *Carey v. State*, 715 P.2d 244, 249 (Wyo. 1986) (uncharged misconduct held admissible in adult rape case; the court observed, as an alternative ground, that the evidence showed that the defendant had “something within him” that motivated him to use force to achieve sexual gratification), *cert. denied*, 479 U.S. 882 (1986).

<sup>18</sup>1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 216, at 1868 (Tillers rev. ed. 1983).

and *Coronets*, Alec Guinness plotted to acquire a title by killing off everyone with a superior claim. Each of the bizarre killings was different, but each was in pursuit of the same plan. This use of uncharged misconduct evidence to show multicrime plans whose parts are linked in the planner's mind is not very controversial.<sup>19</sup>

The concept "plan," and its frequent companion "common scheme," also have been used in the case law to refer to a pattern of conduct, not envisioned by the defendant as a coherent whole, in which the defendant repeatedly achieved similar results by similar methods.<sup>20</sup> These plans could be called "unlinked" plans—the defendant never pictured all the crimes at once, but rather used a "plan" in the sense of saying to himself, "it worked before, I'll try the same plan again." Commentators have derogated this sort of "plan" evidence as "spurious plan" evidence,<sup>21</sup> and in a California acquaintance rape case the court described "common scheme or plan" as merely being an unacceptable euphemism for "disposition."<sup>22</sup> However, this concept of "plan" is a textually plausible interpretation of the rule against character reasoning. The concept of "character" can be construed to refer only to traits manifesting a *general* propensity, such as a propensity toward violence or dishonesty. Under this interpretation, a situationally specific propensity, such as a propensity to lurk in the back seats of empty cars in a shopping center as a prelude to a sexual assault on the owner,<sup>23</sup> can be considered a propensity that is too specific to be called a trait of character.

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<sup>19</sup>For a similar example in the case law, see *State v. Wallace*, 431 A.2d 613 (Me. 1981) (defendant had plan to reconstitute a gun collection previously owned by his father; held, evidence of uncharged burglary in which one gun was recaptured was admissible to show the defendant's involvement in charged burglary in which another was recaptured).

<sup>20</sup>"In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory." IMWINKELREID, *supra* note 10, § 3:23. For example, this approach was used in a case in which prior acts of accepting kickbacks from third parties were admitted to show a "common scheme" to use one's position to acquire kickbacks. See *Commonwealth v. Schoening*, 396 N.E.2d 1004 (Mass. 1979) (held, evidence that defendant took kickbacks on two other occasions, even if from a different party, is admissible to show motive, plan, or common scheme: "[t]he defendant's use of his position to guarantee contracts to particular firms and thus to guarantee kickbacks to himself provided the common or general scheme underlying all three transactions."). But see *United States v. O'Connor*, 580 F.2d 38, 42 (2d Cir. 1978) (bribes taken from third parties not sufficiently probative of "definite project" of committing present crime).

<sup>21</sup>See Note, *Admissibility of Similar Crimes, 1901-51*, 18 BROOK. L. REV. 80, 104-05 (1951) (labelling the category "spurious common scheme or plan"); IMWINKELREID, *supra* note 10, § 3:23 (noting that "commentators have been almost uniformly critical of the [spurious plan] doctrine" and stating that "[t]heir criticism is well-founded").

<sup>22</sup>*People v. Tassell*, 679 P.2d 1 (Cal. 1984).

<sup>23</sup>See *Williams v. State*, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

The rule against character reasoning never has been a rule against all propensity reasoning. Courts admit evidence of situationally specific propensities in other contexts despite the rule. Evidence of "habit"<sup>24</sup> and evidence of "modus operandi" to show identity<sup>25</sup> are examples of evidence that require propensity reasoning, but that are not considered to be character evidence. A tolerant attitude toward evidence of unlinked plans does not really break new ground.

In sex crime cases, the "plan" concept is usually employed in its broadest sense. One occasionally finds "true plan" sex crime cases in which it is possible that the defendant conceived of one continuous plan and carried it out. For example, a defendant's initial acts of kissing or fondling a child might be part of an overall plan to have invasive sex with the child.<sup>26</sup> Usually, however, the "plan" rubric is applied in the unlinked or "spurious" sense—the more expansive sense of following a similar pattern of activity, in a way that indicates that the defendant repeatedly committed the same crime with the same technique and objective, and in that sense followed the same "plan."<sup>27</sup> For example, in *United States v.*

<sup>24</sup> See FED. R. EVID. 406.

<sup>25</sup> See *infra* text accompanying notes 37–40.

<sup>26</sup> See *State v. Paille*, 601 So. 2d 1321 (Fla. App. 1992) ("The fact that the incidents began with kissing and continued over a period of three months is relevant to prove that Paille planned and intended to lure the victim into sexual activity over time. We believe this is relevance beyond mere propensity").

<sup>27</sup> *People v. Oliphant*, 250 N.W.2d 443, 449 (Mich. 1976). In *Oliphant*, the court upheld the admission of three uncharged rapes in consent defense case:

[t]he many similarities in all four cases tend to show a plan and scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent and the defendant could thereby escape punishment. Defendant's plan made it appear that an ordinary social encounter which culminated in voluntary sex had simply gone sour at the denouement due to his reference to complainant's unpleasant body odor.

See *State v. Friedrich*, 398 N.W.2d 763, 772–73 (Wis. 1987) ("the defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship"). But see *United States v. Rappaport*, 22 M.J. 445, 447 (C.M.A. 1986) (psychologist accused of sexual affairs with patients; evidence of uncharged affair with another patient not admissible; "[e]vidence that the accused previously had a similar affair with one of his patients did not tend to establish a plan or overall scheme of which the charged offenses were part"); *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (discussed *infra* at text accompanying note 40); *Getz v. State*, 538 A.2d 726 (Del. 1988) ("The evidence of prior sexual contact [between the defendant and his daughter, the victim] in this case, even if it had adhered to the State's proffer, involved two other isolated events within the previous two years depicting no common plan other than multiple instances of sexual gratification").

Commentators have noted that in sex crime prosecutions, some courts often give prosecutors greater latitude under the "spurious" plan rubric than in other kinds of crimes. See James M.H. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 230 (1965);

*Munoz*,<sup>28</sup> the defendant was accused of sexually fondling his pre-adolescent daughter. The court admitted evidence of uncharged misconduct with another daughter fifteen years earlier to show "plan." The second daughter had not even been born at the time of the molestation of the first daughter. The defendant probably did not have a plan to become the parent of a second daughter and molest her, too, but he did have a common plan or scheme in the sense of following the same approach and precautions in both crimes.

3. *Intent-Absence of Mistake or Accident.* — Courts often have admitted uncharged misconduct evidence to show intent or absence of mistake or accident. They require less of a showing of similarity than when evidence is offered to show that the criminal act was committed.<sup>29</sup>

Sometimes intent can be shown with uncharged misconduct evidence in a fashion that does not involve any inference of a propensity for misconduct. For example, in a murder case, if the defendant bludgeoned a guard on the way to killing the victim, the uncharged misconduct of assaulting the guard would tend to show premeditation, without any inference that the defendant had a general propensity for committing violent or murderous acts.

Usually, however, the evidence is being offered to prove intent by way of proving that the defendant had a propensity to commit the crime. The reason is that the inference of intent is reached by a necessary inference of propensity. This is true even in core examples of the application of the intent/mistake concept, such as in a case in which evidence that a person previously bought stolen goods is being used to show that the person had guilty intent when the person bought stolen goods on the occasion charged.<sup>30</sup> What the trier of fact is being asked to do is to infer that, because the defendant has a continuing propensity to buy stolen goods, the defendant had the forbidden intent on the occasion in question.

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IMWINKELREID, *supra* note 10, § 4:13 n.4, accompanying text; John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 478, 544 n.220.

<sup>28</sup>United States v. Munoz, 32 M.J. 359, 363–64 (C.M.A.), *cert. denied*, 112 S. Ct. 437 (1991) (held, in case where accused charged with fondling intimate parts of 10-year-old daughter for sexual gratification, evidence of similar conduct with other daughter fifteen years earlier admissible to show "plan," despite defense argument that all the evidence did was to provide a "generic description of familial sex abuse").

<sup>29</sup>22 WRIGHT & GRAHAM, *supra* note 9, § 5240, at 482 (courts appear more willing to assume that one mental state will generate another than they are to infer that it will produce action).

<sup>30</sup>*See, e.g.,* Huddleston v. United States, 485 U.S. 681, 683 (1988) (in prosecution for selling stolen goods, evidence of prior "similar acts" admissible to show defendant knew goods he sold were stolen if such evidence is sufficient to allow the jury to find that the defendant committed the act).

Proof of intent, therefore, almost always involves proof of propensity. But that does not mean necessarily that the rule against character reasoning has been extinguished by the exception for evidence to show intent. Many courts, when the evidence is offered to prove intent, require some special degree of similarity between the acts.<sup>31</sup> Thus, intent may not be shown by using—as a bridge from mental state to mental state—the general propensity to be dishonest. However, the propensity to deal in stolen goods is narrow enough. In general, the degree of similarity required to permit use of uncharged misconduct evidence to show intent is less than when the ultimate fact sought to be shown is the doing of the criminal act. Perhaps lack of intent should be regarded as a disfavored defense, which is fair game for proof by means that otherwise would not be allowed.

There is a second limit on using the intent exception as a way around the rule against character reasoning, and it is this limit that is most important in sex crime cases. For uncharged misconduct evidence to be admissible to show intent, intent must be in issue. Sometimes intent is in issue in a fairly straightforward fashion in sex crime cases. This is the case when the criminal sexual contact is based on touching the intimate parts of the victim, and the defendant claims that the touching was accidental, or for a nonsexual purpose, such as bathing or giving medical treatment to a child.<sup>32</sup> The prosecutor can then put in uncharged acts of the defendant to show that the defendant intended to derive sexual gratification from the touching.

In many cases, however, the defendant denies that the act took place and makes no claim about intent. It is a testament to the eagerness of courts to let in the evidence in child cases that, despite this disavowal of any defense of intent, the evidence is sometimes admitted. For example, in *United States v. Hadley*,<sup>33</sup> the defendant, a teacher, was accused of sexually abusing young boys who were his students. After two students, aged nine and eleven, had testified and had been impeached on cross-examination, the trial judge admit-

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<sup>31</sup> 22 WRIGHT & GRAHAM, *supra* note 9, § 5242, at 490–91.

<sup>32</sup> See, e.g., *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981) (evidence of other child molestation admitted to show intent where defense counsel argued government had burden of showing beyond reasonable doubt that touching not accidental); *State v. Wermerskirchen*, 497 N.W.2d 236 (Minn. 1993) (held, where defendant denies act of touching child in intimate parts, jury should be instructed that evidence of uncharged sexual touching of others is admissible to show intent).

33918 F.2d 848 (9th Cir 1990), *cert. granted*, 112 S. Ct. 1261 (Mar. 2, 1992), *cert. dismissed as improvidently granted*, 113 S. Ct. 486 (Nov. 16, 1992). See also *United States v. Bender*, 33 M.J. 111 (C.M.A. 1991) (in case where charged crime was fondling and digital penetration of ten-year-old daughter, and element of crime charged was deriving sexual gratification from act, testimony by another young girl that accused had fondled her on numerous occasions is admissible to show intent and motive, despite lack of defense that acts were accidental or medicinal).

ted the testimony of two young adult men that Hadley had molested them repeatedly while they were minors. Hadley argued that the acts were inadmissible because he did not contend that he lacked intent, but instead denied participation in the acts charged. His counsel had offered not to argue the issue of intent to the jury. The Ninth Circuit held that the evidence was admissible because it went to criminal intent, and the government still had the burden of proof on intent whether the defendant relied on that defense or not. There is, however, a conflict on this point, with a number of decisions saying there must be a significant dispute over intent before uncharged conduct can be received to show intent.<sup>34</sup>

In adult rape cases, the reported opinions tend to hold that intent is not in issue.<sup>35</sup> In Wigmore's words,

Where the charge is of rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the intent principle has no necessary application.<sup>36</sup>

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<sup>34</sup> See *United States v. Gamble*, 27 M.J. 298, 304 (C.M.A. 1988) (where kind of act accused committed is almost always an intentional act, court should decline to receive uncharged misconduct evidence on issue of intent until after accused has put in evidence, in order to see whether accused challenges intent); *Getz v. State*, 538 A.2d 726, 733 (Del. 1988):

The defendant denied any sexual contact with his daughter. While the defendant's plea of not guilty required the State to prove an intentional state of mind as an element of the offense, the plea itself did not present a predicate issue concerning intent sufficient to justify the State in attempting to negate lack of intent as part of its case-in-chief.

*Thompson v. United States*, 546 A.2d 414, 423 (D.C. Ct. App. 1988) ("where intent is not controverted in any meaningful sense, evidence of other crimes to prove intent is so prejudicial *per se* that it is inadmissible as a matter of law").

Commentators generally agree that intent ought to actually be in dispute. See, e.g., LEMPERT & SALTZBURG, *supra* note 12, at 224-25. Kenneth Graham agrees that intent should be in serious dispute, but recognizes that authority to the contrary exists. 22 WRIGHT & GRAHAM, *supra* note 9, §5242, at 489.

<sup>35</sup> See SUSAN ESTRICH, REAL RAPE 94-95 (1987) (citing cases); *State v. Saltarelli*, 655 P.2d 697, 700-01 (Wash. 1982) (defendant, charged with rape of acquaintance, raised consent defense; held, reversible error to receive evidence of prior attempted rape of different woman; evidence not admissible on theory that it shows intent). But see *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989) (consent defense rape case; prosecution evidence indicated that the accused took his date to his room, showed her a slide show that included music, and then forcibly raped her; "the theory of the defense was that appellant was experienced and successful with women, that he was a romantic, a poet, an amateur 'photojournalist,' and a 'Top Gun' pilot, who would never resort to rape to overcome the will of a woman" and that complainant either consented or misled him into thinking she was consenting; held, evidence of other similar sexual assaults admissible to show "intent, scheme or design" to have intercourse with date whether or not she consented).

<sup>36</sup> 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 357, at 334 (Chadbourn rev. ed. 1979).

Although it is dangerous to make any generalizations in this area, this view seems to have achieved fairly wide acceptance.

4. *Identity*.—Proof of “identity” is one of the permissible purposes listed in Rule 404(b). An identity issue does not automatically open the door to evidence of any and all uncharged misconduct, but it does allow identification of the defendant **as** the perpetrator by showing that the defendant committed prior crimes using the same *modus operandi* **as** the perpetrator of the charged crime.<sup>37</sup> One often finds statements in cases that the modus must be like a “signature” or even “unique,”<sup>38</sup> but many cases exist when less has been required. For example, in a 1985 robbery case, the Arizona Supreme Court admitted evidence of prior robberies, even though the only similarity noted by the court between the uncharged crimes and the charged crime was that they all involved robberies of similar convenience stores.<sup>39</sup>

Identity will be in dispute in stranger rape cases, but not in acquaintance rape cases. This has led to rulings that *modus* evidence is not admissible in acquaintance rape cases.<sup>40</sup> Sometimes this reasoning results in exclusion even where the uncharged misconduct and the charged acts have substantial similarities. For example, in *People v. Tassell*,<sup>41</sup> a 1984 California Supreme Court case, the court reversed a conviction because the trial court had received evidence, in a consent defense case, that the defendant had committed two other rapes. According to the state’s evidence, the victim was a

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<sup>37</sup> “[T]he need to prove identity should not be, in itself, a ticket to admission. Almost always, identity is the inference that flows from . . . [other] theories . . . [L]arger plan . . . distinctive device . . . [and] motive . . . seem to be most often relied on to show identity.” MCCORMICK ON EVIDENCE § 190, at 808 (John William Strong et al., eds., 4th ed. 1992).

<sup>38</sup> “[C]ourts use a variety of terms to describe the uniqueness needed to invoke the *modus operandi* theory, including ‘distinguishing,’ ‘handiwork,’ ‘remarkably similar,’ ‘idiosyncratic,’ ‘signature quality,’ and ‘unique.’ Myers, *supra* note 27, at 550 (citing cases).

<sup>39</sup> *State v. Smith*, 707 P.2d 289, 297 (Ariz. 1985). Cf. *People v. Massey*, 16 Cal. Rptr. 402 (Cal. Dist. Ct. App. 1961) (evidence of similar burglary admitted, though similarities hardly enough to justify analogy to “signature”).

<sup>40</sup> See, e.g., *United States v. Ferguson*, 28 M.J. 104 (C.M.A. 1989) (held, when accused charged with sexual abuse of one adolescent stepdaughter, testimony of another stepdaughter about similar abuse not admissible to show “*modus operandi*” because identity of the perpetrator **was** not in dispute) (alternative holding); *Velez v. State*, 762 P.2d 1297 (Alaska Ct. App. 1988) (error to admit *modus* evidence in consent defense case, because identity not in issue); *People v. Tassell*, 679 P.2d 1 (Cal. 1984) (held, prior rape inadmissible in consent defense case; *modus* evidence not admissible unless identity is in issue); *People v. Barbour*, 436 N.E.2d 667, 672–73 (Ill. Ct. App. 1982) (*modus* evidence not admissible in consent defense **cases**, there being no issue of identity). **But see** *State v. Willis*, 370 N.W.2d 193, 198 (S.D. 1985) (*modus* evidence admissible in consent defense case **as** showing intent and plan; prior case holding that *modus* evidence not admissible because identity not in issue overruled).

<sup>41</sup> 679 P.2d 1 (Cal. 1984).

waitress who had given the defendant a ride home after work. The defendant forced her to drive to another location and then raped her in her van. There were commonalities between that rape and the uncharged rapes: they all took place in vehicles; they all involved the use of a similar thumbs-against-windpipe choke hold; and, in one uncharged instance, the perpetrator used the same false first name as that used by the defendant in the charged incident. In reversing for admitting the evidence, the court remarked: "There being no issue of identity, it is immaterial whether the *modus operandi* of the charged crime was similar to that of the uncharged offenses."

**5. Other Noncharacter Purposes.**—As already noted, the list of permitted purposes in Rule 404(b) is not exhaustive. The rule expressly indicates that the purposes listed there are only illustrative by preceding the list of examples with the words "such as." Any use that does not involve character reasoning is permissible even if it is not on the list.

The list is fairly comprehensive, but sometimes courts use labels that are not on the list. For example, one finds statements that evidence of a "pattern" of criminal conduct is admissible. In a 1987 Minnesota Supreme Court case<sup>42</sup> involving rape of an adult, the court upheld the admission of two sex crimes against children on grounds that they showed a "pattern" of "opportunistic sexual assault" on "vulnerable" victims. Here the "pattern" is so broad that admitting pattern evidence is no different than admitting character evidence.

### *B. Beyond 404(b)—The Lustful Disposition Exception*

Some jurisdictions have gone beyond Rule 404(b), and admitted evidence of uncharged misconduct to show "lustful disposition" or "depraved sexual instinct" in cases involving sex crimes against children.<sup>43</sup> As Professor Imwinkelreid has said, "In these jurisdic-

<sup>42</sup>State v. Crocker, 409 N.W.2d 840 (Minn. 1987).

<sup>43</sup>See Maynard v. State, 513 N.E.2d 641 (Ind. 1987) (in child sex crime case, uncharged child abuse of third party by defendant admissible to show "depraved sexual instinct" as well as defendant's "continuing plan" to exploit and abuse the victim), overruled *in relevant part* by State v. Lannan, 600 N.E.2d 1334, 1339 (Ind. 1992) (depraved sexual instinct exception no longer recognized in Indiana); State v. Lachterman, 812 S.W.2d 759 (Mo. App. 1991) (homosexual sodomy with young boys; prior acts admitted on "depraved sexual instinct" theory), *cert. denied*, 112 S. Ct. 1666 (1992); State v. Raye, 326 S.E.2d 333, 335 (N.C. App.), *review denied*, 332 S.E.2d 183 (N.C. 1986) (prior sexual abuse of victim's sister admissible to show intent and "unnatural lust" of defendant-stepfather); State v. Tobin, 602 A.2d 528 (R.I. 1992) (lewd disposition exception to rule against character evidence recognized in case in which evidence of prior acts involved same victim); State v. Edward, Charles L., 398 S.E.2d 123, 131 (W.Va. 1990) (held, in federal rules state, uncharged misconduct evidence admissible to show, inter alia, lustful disposition toward the defendant's

tions, intellectual honesty triumphed, and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct."<sup>44</sup> Other courts reject the "depraved sexual instinct" approach on grounds that it violates the prohibition against using character to show conduct, and they sometimes treat the *Federal Rules of Evidence* as shutting off the option of admitting evidence on a "lustful disposition" or "depraved sexual instinct" theory.<sup>45</sup>

The leading recent case is *State v. Lannan*,<sup>46</sup> a 1992 case that abolishes Indiana's "depraved sexual instinct" exception to the rule against character evidence. The Lannan court notes that the exception had been based on two rationales: first, that there was a high rate of recidivism in child molestation cases; and second, that there was a special need "to level the playing field by bolstering the testimony of a solitary child victim-witness."<sup>47</sup> The court was willing to accept the proposition that a high recidivism rate among sex offenders existed, but believed it to be no higher than for drug offenders, and hence that sex offenses were not special enough to justify an exception.<sup>48</sup> As to the bolstering rationale, the court noted that sex crimes against children now are thought to be common, and said that the depraved instinct exception had its origins "in an era less jaded than today." The case that created the "depraved sexual instinct" exception was a 1930s case in which a superior court judge had been charged with child sex abuse. The Lannan court thought (that at that time) the idea that a man who was a pillar of the community would force himself sexually on a child "bordered on the preposterous." The court added that "[s]adly, it is our belief that fifty years later we live in a world where accusations of child

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children); *State v. Tarrell*, 247 N.W.2d 696 (Wis. 1976) (sexual abuse of child; evidence that defendant had made obscene remark to female child and had masturbated in presence of other young females admissible as showing defendant's "propensity to act out his sexual desires with young girls"), overruled *in part* by *State v. Fishnick*, 378 N.W.2d 272, 277 (Wis. 1985) (language in *Tarrell* stating that evidence could be received to show sexual propensity is "withdrawn"). See generally Myers, *supra* note 27, at 540.

<sup>44</sup> IMWINKELREID, *supra* note 10, § 4:14, at 4-37.

<sup>45</sup> See, e.g., *Getz v. State*, 538 A.2d 726, 733-34 (Del. 1988) ("The sexual gratification exception proceeds on the assumption that a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt. The exception thus equates character disposition with evidence of guilt contrary to the clear prohibition of D.R.E. Rule 404(b)").

<sup>46</sup> 600 N.E.2d 1334 (Ind. 1992); accord *Getz* 538 A.2d at 733-34 (overruling prior case recognizing sexual gratification exception); *Fishnick*, 378 N.W.2d at 277 (withdrawing language in prior case that endorsed use of evidence of other crimes to prove sexual propensity).

<sup>47</sup> *Lannan*, 600 N.E.2d at 1335.

<sup>48</sup> *Id.* at 1336-37.

molestation no longer appear improbable as a rule. This decaying state of affairs in society ironically undercuts the justification for the depraved sexual instinct exception at a time when the need to prosecute is greater."

Although a few states have abandoned the "depraved sexual instinct" exception, many still continue to recognize it in child sex cases, but not in adult rape cases.<sup>49</sup> The reason probably lies in a feeling that a desire for heterosexual intercourse with an adult, even when forced, is not as unusual or depraved as a desire for sex with a child.

### 111. Proposals for Change

We have sought to describe the existing body of doctrine governing the reception of uncharged misconduct evidence in sex offense cases. Although to generalize about this body of law is difficult, we believe that the following observations are true. First, in sex offense cases the Rule 404(b) categories often are manipulated and sometimes stretched out of shape. Second, despite the willingness of courts sometimes to manipulate the categories in order to receive evidence, there are still plenty of reversals for letting in sex crime evidence—the courts do not universally or uniformly stretch the categories. Third, courts in a number of jurisdictions are less likely to

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<sup>49</sup> Cases recognizing a form of the lustful disposition exception include: *State v. Jerousek*, 590 P.2d 1366, 1372–73 (Ariz. 1979) (upholding "the emotional propensity for sexual aberration exception" in child sexual abuse case where act is similar to charged crime, committed shortly before charged crime, and involves sexual aberration); *State v. Tobin*, 602 A.2d 528 (R.I. 1992) (although reversing conviction on other grounds, the court upheld its "lustful disposition" exception, at least in cases involving prior incestuous relations between the defendant and the victim); *State v. Edward, Charles L.*, 398 S.E.2d 123 (W.Va. 1990) (held, in federal rules state, uncharged misconduct evidence admissible to show lustful disposition toward children). For cases that decline to apply a recognized lustful disposition exception to adult rape cases, see *State v. McFarlin*, 517 P.2d 87, 90 (Ariz. 1973) (lustful disposition exception is limited to cases involving sexual aberration; "as one court pointed out, the fact that one woman was raped is not substantial evidence that another did not consent"); *State v. Valdez*, 534 P.2d 449, 452 (Ariz. Ct. App. 1975) (dictum; lustful disposition exception not available in adult rape case, but evidence admitted on common plan rationale); *Reichard v. State*, 510 N.E.2d 163 (Ind. 1987) (consent defense case in which defendant was accused of raping woman, with whom he had a dating relationship, in her apartment; reversible error for trial judge to admit unspecified "evidence of prior alleged rapes perpetrated by [defendant] on various individuals"; court states that rape of an adult woman does not fit the then-recognized "depraved sexual instinct" exception because rape of an adult woman is not depraved sexual conduct); *Lehiy v. State*, 501 N.E.2d 451, 453 (Ind. App. 1987) (in case decided before the Indiana Supreme Court abolished depraved sexual instinct exception, Court of Appeals of Indiana held that heterosexual rape evidence was not admissible under the exception, although evidence of incest or "sodomy" would be admissible), *aff'd*, 509 N.E.2d 1116 (Ind. 1987).

admit uncharged misconduct evidence in acquaintance rape cases than in stranger rape or child abuse cases. This result occurs in consent defense cases reasoning that identity is not in issue, so modus evidence is not admissible. These courts tell us that they would decide differently if the case had been a stranger rape, alibi defense case.<sup>50</sup> In child sex cases in which identity is not in issue, the gap sometimes is filled with the “depraved sexual instinct” exception—an exception that does not apply to adult rape cases.<sup>51</sup>

This different treatment of acquaintance rape cases is wrong. If anything, the case for using uncharged misconduct evidence is stronger in acquaintance rape cases than in stranger rape cases.

First, there is a danger in stranger rape cases that does not exist in acquaintance rape cases—that the defendant became a suspect *because* of prior rapes. The police may have shown the victim photos of persons thought to have committed prior rapes, or otherwise have focused their investigation and evidence-gathering efforts on suspected sex offenders. What appears to be an unbelievable coincidence—that a person who actually committed prior rapes had the misfortune to be falsely accused of a subsequent one—is in fact a fairly plausible scenario. Because suspicion initially focused on the defendant based on the other crime, his chance of being accused, even if innocent, was fairly high.<sup>52</sup>

The problematic nature of identification evidence compounds this danger. A strong body of social science research exists showing that eyewitness identification is fraught with all sorts of difficulties and chances for error,<sup>53</sup> and that jurors tend to overrate the ability of witnesses to make identifications.<sup>54</sup> Evidence of prior rapes may

<sup>50</sup> See cases cited *supra* note 5. Of course, there are some counter-examples—jurisdictions where the evidence seems to be admitted equally in both situations, because courts use the “spurious plan” reasoning. See cases cited *supra* note 27.

<sup>51</sup> See *supra* note 43 and accompanying text.

<sup>52</sup> See LEMPET & SALTZBURG, *supra* note 12, at 217 (suggesting that value of evidence of other crimes is undermined by the danger that defendant was identified because he was one of the “usual suspects” for that type of crime).

<sup>53</sup> See, e.g., ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 142–44 (1979) (unconscious transference can cause witness to identify suspect because witness saw suspect, or photo of suspect, in context other than crime); Platz & Hosch, *Cross-Racial Ethnic Eyewitness Identification: A Field Study*, 18 APPLIED SOC. PSYCHOL. 972, 981–83 (1988) (difficulty of cross-racial identification); Loftus & Loftus, *Some Facts about “Weapon Focus,”* 11 LAW & HUM. BEHAV. 55, 61–62 (1987) (“weapon focus” often interferes with identification capacity). See generally ELIZABETH LOFTUS, *supra* (describing problems with eyewitness identification).

<sup>54</sup> See, e.g., Cutler, et al., *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 54 (1988); Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony*, EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 271–72 (1984).

distract the jury from the important task of sifting problematic identification evidence.

In consent defense cases, the misidentification problem does not arise. Moreover, evidence of prior sexual assaults may assist in combatting prejudice against victims. Evidence that jurors are too ready to blame the victim in acquaintance rape cases exists. The Kalven and Zeisel jury study contains data suggesting that jurors use prejudicial extralegal considerations in acquaintance rape cases. Kalven and Zeisel measured the judge-jury disagreement rate (reflecting situations in which the jury acquitted, but the judge felt that the jury should have convicted) in different types of cases, including two types of rape cases. In "aggravated" rape cases (stranger rape, extra violence, multiple assailants) the disagreement rate was only twelve percent.<sup>55</sup> In "simple" rape cases, it went up to sixty percent.<sup>56</sup> Juries acquitted much more often than judges in the "simple" rape cases—primarily, judges thought, because of extralegal ideas about "contributory fault"—that the victim had brought the event on herself by such acts as hitchhiking or wearing provocative clothing.<sup>57</sup> Evidence that the defendant raped other victims can show the jury that the rape could have occurred without this victim's "contributory" behavior.

Moreover, the consent defense cases, like the child sex abuse cases, are cases where there is a need for additional evidence. The consent defense rape case is often a swearing match between the accused and the alleged victim. It is hard to develop evidence that the offense occurred, other than the testimony of the victim.

In an influential 1988 article about the nature of evidence law,<sup>58</sup> Professor Dale Nance argued that the organizing principle of evidence law is not, as Wigmore and Thayer postulated, the desire to control the jury in order to prevent it from making foolish or irrational decisions.<sup>59</sup> Instead, the fundamental principle is to encourage the parties to put forward the best evidence that they can feasibly obtain. Although no single foundational principle explains all of evidence law, the Nance hypothesis probably identifies one of the several driving forces behind the rules excluding evidence.

Where does the Nance hypothesis lead us if we apply it to rape cases? In stranger rape cases, one might be concerned that admitting uncharged misconduct would have a harmful effect on the develop-

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<sup>55</sup> HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 253 (1966).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 249–54.

<sup>58</sup> Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

<sup>59</sup> *Id.* at 294.

ment of proof. If the uncharged misconduct rule were relaxed, prosecution resources unwisely might be diverted from the search for better evidence to the search for uncharged misconduct. There often are other sources of evidence in stranger rape cases. The defendant's alibi might be disproved. The defendant might be connected to the crime by analysis of hair, blood, or semen. Some of these analyses are quite expensive, and the prosecution might forego these analyses if it could have the same chance for a conviction with the use of uncharged misconduct evidence. In contrast, in acquaintance rape cases, there is not much to fear about misdirecting time and resources at investigation and trial. Aside from the testimony of the eyewitnesses, the uncharged misconduct is likely to be the best evidence available.

The differential treatment of consent defense cases may be a vestige of bias against date rape complainants. That the rather fluid categories of Rule 404(b) and its predecessors have proven to be too narrow to let in evidence in acquaintance rape cases may stem from an attitude that defendants in these types of cases *deserve* more protection than stranger rapists and child molesters. Date rape may get different treatment because of the same attitudes that led to the requirement that rape complaints be corroborated,<sup>60</sup> to the idea that rape complainants automatically should be subjected to a mental examination,<sup>61</sup> to instructions warning the jury that rape is easy to fabricate and hard to disprove,<sup>62</sup> and to the requirement of "utmost resistance" that once hampered the prosecution of date rape cases.<sup>63</sup> Treating acquaintance rape cases the same way *as* stranger rape cases for purposes of uncharged misconduct evidence is consistent with the pattern of changes elsewhere in rape law, which now tends to treat acquaintance rape *as* a crime every bit as deserving of successful prosecution *as* other forms of sexual assault.

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<sup>60</sup>7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2062, at 464-69 (Chadbourn rev. ed. 1978) (describing corroboration rule applicable in some jurisdictions).

<sup>61</sup>3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Tillers rev. ed. 1983).

<sup>62</sup>ESTRICH, *supra* note 35, at 54.

<sup>63</sup>*Id.* at 29-30 (describing cases such *as Brown v. State*, 106 N.W. 536 (Wis. 1906) (held, in a case involving neighbors who had known each other all their lives, that screaming, pushing, and saying "let me go" was not enough to satisfy the utmost resistance requirement, even if defendant grabbed victim, tripped her, covered her mouth with his hand and told her to shut up). Estrich also asserts that the "utmost resistance" requirement was applied unevenly, a view that is related to her view that acquaintance rape is just *as* frightening *as* stranger rape. *Id.* at 25. "[O]ne is hard pressed to find a conviction of a stranger, let alone a black stranger, who jumped from the bushes and attacked a virtuous white woman, reversed *for* lack of resistance, even though the woman reacted exactly *as* did the women in [acquaintance rape cases.]" *Id.* at 32-37.

At a minimum, the different treatment of acquaintance rape cases should be abandoned. The justifications for admitting uncharged misconduct in those cases are at least as strong as in stranger rape cases. To the extent that uncharged misconduct evidence is admissible to show identity in stranger rape cases—because of similarities between the different sexual assaults—it also should be admissible to show that the defendant acted with force in acquaintance rape cases.

Now we will turn to a broader reform issue, the one about which our views are tentative. That broader issue is whether evidence of uncharged sex offenses should be admitted freely without any special requirements of similarity of conduct. This proposal is now pending in Congress, in the form of legislation to amend the *Federal Rules of Evidence*.<sup>64</sup> The proposal would add three new rules. New Rule 413 would provide that when the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. New Rule 414 would make the same provision for criminal child molestation cases and new Rule 415 would make the same provision for civil cases involving sexual assault or child molestation. The proposed rules contain provisions for notifying the accused of the nature of the prior bad acts before trial.

The new rules do not go so far as to make all uncharged sexual misconduct freely admissible in sex offense cases. The uncharged misconduct itself must be a serious offense.<sup>65</sup> Sexual misconduct that does not rise to the level of serious crime still would be subject to the existing Rule 404(b) screening. On the other hand, the rule still would have potentially broad effect. For example, if proposed Rule 414 is read literally and without qualification, evidence that the defendant previously had consensual intercourse with a thirteen-year-old girl would be admissible in a subsequent case in which the defendant was accused of having engaged in sex with a five-year-old boy.

We will start by asking whether the legislation creates anomalies or inconsistencies. Does the view that this evidence is not unduly

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<sup>64</sup>S. 6, 103d Cong., 1st Sess. § 112 (1993). [Editor's note: This proposal subsequently has passed the Senate as S. 1607, Nov. 5, 1993, and is now pending before the House.]

<sup>65</sup>The proposed rule would apply to evidence that the defendant previously had committed a federal child molestation offense, any other child molestation offense involving anal or genital contact, any offense against an adult for a nonconsensual sex crime involving anal or genital contact, any offense that involves deriving sexual gratification from the infliction of death, bodily injury, or physical pain on another person, and any attempt or conspiracy to engage in the above-described conduct. See *id.* § 121.

prejudicial conflict with the way we treat character evidence in other areas?

The first possible anomaly is in the different treatment of the accused and the alleged victim. Under rape shield legislation, the victim is entitled to protection from revealing her sexual history—subject to certain exceptions, such as the exception for sexual conduct with the accused. One might argue that because the sexual history of the alleged victim is excluded, the sexual history of the accused also should be excluded.

This argument is unconvincing. First, the rape shield laws are distinguishable because they are grounded not only on a desire for accuracy in litigation, but also on considerations of extrinsic policy. They are designed to protect victims from embarrassment in order to encourage victims to report rape. The encouragement rationale simply does not apply to evidence about a defendant's sexual misconduct.

Second, victims have a legitimate privacy interest in keeping facts about their sexual history secret. No similar purpose is served by suppressing evidence of prior sex offenses of an accused. The defendant is not entitled to keep secret evidence that he committed sex crimes.<sup>66</sup>

Another possible anomaly in the treatment of character evidence is more striking. The proposed statute would create a special rule of free admissibility for sex offenses, while preserving the rule against character reasoning for other offenses. Why should the rules concerning admissibility of prior offenses be more liberal when sex crimes are involved than they are when the charged crime is murder, robbery, or nonsexual assault? In a case in which the charged crime is rape and murder, would one admit a prior rape by the accused without any showing of special similarity, while excluding a prior murder by the accused unless it is shown to be similar?

It is possible that evidence of uncharged misconduct is better evidence in sex offense cases—even without special similarities—than is evidence of uncharged misconduct in bank robbery or murder cases. If that is the case, the advocates of the new legislation have not yet articulated that basis. The evidence about recidivism

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<sup>66</sup> This distinction is recognized in the pending bill's sponsor statement. See Statement by Senator Strom Thurmond, on behalf of twenty-seven sponsors of the Comprehensive Violent Crime Control Act of 1991, inserting a section-by-section analysis of the bill in the *Congressional Record*. The analysis applicable to proposed Federal Rules of Evidence 413–415 is at 137 CONG. REC. S 3192, \*S3241–42 (daily ed. February 13, 1991) [hereinafter *Section-by-Section Analysis*]. The 1991 bill's proposed Rules 413–415 are identical to the 1993 bill's proposed evidence rules, and the sponsors of the 1991 bill overlap with those of the 1993 bill.

does not support the distinction. In a 1989 *Bureau of Justice Statistics Report* that followed 100,000 prisoners for three years after release, the recidivism rate was *lower* for sex offenders than for most other categories. According to these figures, **31.9%** of released burglars were rearrested for burglary; **24.8%** of drug offenders were rearrested for a drug offense; 19.6% of violent robbers were rearrested for robbery, but only **7.7%** of rapists were rearrested for rape.<sup>67</sup> (Of the offenses studied, only homicide had a lower recidivism rate—2.8%). Other studies of sex offenders with smaller groups and different periods of follow-up have shown both higher and lower recidivism rates for certain populations of sex offenders, but without demonstrating that sex offenders have a consistently higher or lower recidivism rate than other major crime categories studied for the same time period with the same methods.<sup>68</sup> Some commentators have suggested that studies based on rearrest or reconviction vastly understate the rate of recidivism, because sex offenders may commit hundreds of acts without getting caught<sup>69</sup>—but this may be true of burglars and drug offenders as well. The case for treating uncharged sex offenses differently than other offenses has not been supported by data about a higher rate of recidivism.

The sponsor statement in support of the bill stresses a probabilistic argument—that it is inherently improbable that a person whose prior acts show him to be a rapist or child molester would

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<sup>67</sup> ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983, 1 (1989).

<sup>68</sup> See Lita Furby, et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989); see also DAVID FINKELHOR, A SOURCE BOOK FOR CHILD SEX ABUSE 134-41 (1986). For an example of a study showing a higher recidivism rate, see Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released From A Maximum Security Psychiatric Institution*, 59(3) J. CONSULTING & CLINICAL PSYCHOL. 381 (1991). This study tracked extrafamilial child molesters incarcerated in a maximum security psychiatric institution for an average 6.3 year follow-up period; 31% of the subjects were convicted of a new sex offense. The authors noted, however, that the nature of their subjects—maximum security inmates—may have inflated their recidivism results. In their comprehensive review of sex offender recidivism studies, Furby et al. noted that “The differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants.” Furby, *supra* at 27 (citation omitted).

<sup>69</sup> See, e.g., A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28(3) CRIME & DELINQ. 450 (1982) (anonymous questionnaire given to convicted and incarcerated rapists and child molesters; on average, the subjects indicated they committed two-to-five times as many sex crimes for which they were not apprehended); FINKELHOR, *supra* note 68, at 132 (In analyzing ten studies of child molestation recidivism, the authors noted that these studies “probably gravely understate the amount of subsequent offending committed by the men who were studied. The investigators routinely used as their criteria of recidivism subsequent offenses that came to the attention of the authorities”); Judith V. Becker & John A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19(1) CRIM. JUST. & BEHAV. 74, 82 (1992) (“undetected crime is quite extensive among sex offenders and . . . official data may reveal only a small percentage of the total sexual offenses committed”).

have the bad luck to be hit later with a false accusation.<sup>70</sup> Would it not be an incredible coincidence for that to happen by chance? Our answer **is** yes—especially if the accusations are independent, so there is no chance that one accusation caused the other. But the same assertion applies to all crimes. If the defendant is accused **of** murder, would it not be a bizarre coincidence for him to just happen to have been independently accused by three different people of other murders? If a probabilistic exception is to be made to the rule against character evidence in cases involving multiple accusations, then a consistent approach requires that the exception be made across the board.

Judgments about the new legislation are likely to be influenced by something other than one's view on whether character reasoning has more probative value in sex crime cases than in other cases. Two other influences are likely to be more important: first, one's attitude toward character evidence as a whole; and second, one's substantive attitude towards sex crimes.

If one believes that the rule against character reasoning rests on shaky grounds, then relaxing it piecemeal is easier to accept. The relaxation can be viewed **as** incremental reform, or as a pilot program with an eventual goal of receiving the evidence generally.

There are reasons to doubt the overall usefulness of the rule against character reasoning. First, the character evidence doctrines are extremely complicated, confusing, and unclear. They produce large quantities of appellate litigation<sup>71</sup> that seems to do little to dispel the unclarity. Second, evidence about past misconduct is the type of evidence that one would want to have in making judgments in everyday life. If nothing else, the refusal of the law to receive the evidence undermines the legitimacy and acceptability of factfinding.<sup>72</sup> The rule excluding uncharged misconduct is contrary to the trend in evidence law toward free proof. There has been a centuries-long trend toward abolition of a certain type of exclusionary rule—those based on the danger of misleading the factfinder. Evidence scholars and jurists increasingly have come to agree with Bentham

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<sup>70</sup> See *Section-by-Section Analysis*, *supra* note 66, at \*S3240.

<sup>71</sup> *IMWINKELREID*, *supra* note 10, § 1:04 (LEXISearch reveals over 3000 cases); *WRIGHT & GRAHAM*, *supra* note 9, § 5239. On our topic of the admissibility of uncharged sex crimes in sex crime cases, there were 95 published appellate opinions in the year 1992 alone.

<sup>72</sup> See generally Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (arguing that the need to promote public acceptance of verdicts can better explain many evidentiary rules); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986-87) (applying acceptability thesis to character evidence).

that technical rules of evidence designed to protect the factfinder from misdecision are, at best, more trouble than they are worth.<sup>73</sup> When a rule of exclusion has those strikes against it, it should be supported by convincing arguments about why the special needs of legal institutions counsel a departure from common sense, or about why deeper study shows common sense to be wrong.

Some legal commentators have seen convincing evidence to support the rule against character reasoning in the literature on personality theory.<sup>74</sup> They base their conclusion largely on the belief that trait theory, which held that human behavior is consistent across situations and stems from the person's underlying disposition, has been displaced by "situationism," which maintains that humans react very particularistically to different events, and that character traits do not produce cross-situational stability of behavior.<sup>75</sup>

Some of the research relied on by situationists is interesting and suggestive. For example, research indicates that there is little consistency in deceitful behavior by children—a child may lie at school and not lie at home, or cheat on an exam and not cheat in sports.<sup>76</sup> While this research is interesting and valuable, however, situationism is by no means a consensus position. Trait theory is not dead. There is a live controversy among scholars in the field about behavioral consistency. Some contemporary scholars support trait theory and reject the situationist position,<sup>77</sup> or maintain that stability can

<sup>73</sup> See WILLIAM L. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985).

<sup>74</sup> For examples of commentators who find considerable support for the rule against character reasoning in the psychology literature, see Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984), and Leonard, *supra* note 72. For a more receptive view of character evidence based on an interactionist perspective, see Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 518 (1991).

<sup>75</sup> Leonard, *supra* note 72, at 25-29. See generally WALTER MISCHEL, *PERSONALITY AND ASSESSMENT* (1968); 1 HUGH HARTSHORNE & MARK A. MAY, *STUDIES IN THE NATURE OF CHARACTER* 411-12 (1928).

<sup>76</sup> The results of the Hartshorne study show that deceit and honesty are not "unified character traits, but rather specific functions of life situations. Most children will deceive in certain situations and not in others." HARTSHORNE & MAY, *supra* note 75, at 411. See also PEIER D. SPEAR, ET AL., *PSYCHOLOGY: PERSPECTIVES ON BEHAVIOR* 574-76 (1988).

<sup>77</sup> JOHN M. DARLEY, ET AL., *PSYCHOLOGY* 464-65 (5th ed. 1991) (undergraduate textbook published by Prentice-Hall); James J. Conley, *Longitudinal Stability of Personality Traits: A Multitrait-Multimethod-Multioccasion Analysis*, 49 J. PERSONALITY & SOC. PSYCHOL. 1266 (1985) ("The data of this longitudinal study carried out over five decades strongly indicate that there is a set of personality traits that are generalizable across methods of assessment and are stable throughout adulthood"). See generally David C. Funder & Daniel J. Ozer, *Behavior as a Function of the Situation*, 44 J. PERSONALITY & SOC. PSYCHOL. 107 (1983); David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 282-84 (1987) ("social science is by no means monolithic in condemning trait theory").

be observed for certain traits, such as aggressiveness.<sup>78</sup> Others argue for another approach to the study of behavior, interactionism, which emphasizes the need to consider both trait and situation in predicting behavior.<sup>79</sup>

Moreover, the research on which situationist theory is based is not as easily generalizable to legal issues as is other research in psychology, such as research on eyewitness testimony. The traits examined in the laboratory and in field studies—deceit, punctuality, introversion, obedience—are a far cry from the traits that might cause violent criminal activity.

Even if behavior is strongly influenced by situational considerations, and the studies showing this can be generalized to sex offenses, in supporting exclusion, one must still face the question whether it has been shown that the jury cannot handle this sort of information. Some commentators have found support for this proposition in studies of fundamental attribution error—studies suggesting that research subjects tend to attribute too much influence to disposition, and not enough to situation, in assessing causes of human behavior.<sup>80</sup> For example, even if told that a debater had no choice

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<sup>78</sup>One contemporary scholar believes that

[T]he evidence essentially shows that **some** people are indeed apt to act the same way whenever an aggressive opportunity arises. If they are relatively free to do what they want in a given situation, there is a good chance that these individuals will behave in the same manner on many occasions. They will try to hurt someone if they have an underlying aggressive disposition, or they will not attack a target if they have a non-aggressive personality.

LEONARD BERKOWITZ, AGGRESSION: ITS CAUSES, CONSEQUENCES AND CONTROL 128-29 (1993).

<sup>79</sup>DARLEY, *supra* note 77; Davies, *supra* note 74.

<sup>80</sup>See Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 33 (1988) ("The function of character traits is exaggerated, whereas the function of situational variances as pivotal factors influencing the behavior of others is minimized"); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 778 (1975) ("It is predictable, therefore, that when jurors receive information about prior criminal acts of an accused they impute to him a dispositional quality and give inadequate attention to the possibility of situationally oriented explanations for his conduct"). Cf. Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 352-53 (1979) ("The jury, like any individual, is incapable of segregating [evidence of prior bad acts] to just one trait. It will inevitably use it to form a complete picture of the [defendant]"). Commentators also have pointed out that research subjects display a tendency to judge character in a reductionist fashion, concentrating on one or two salient personality traits and ignoring complexities. See Mendez, *supra* note 74.

Perhaps the factor that most induces jurors to overestimate the probative value of character evidence is what psychologists term the "halo effect." In the present context it might be more aptly called the "devil's horns effect." The term refers to the propensity of people to judge others on the basis of one outstanding "good" or "bad" quality. This propensity may stem from a tendency to overestimate the unity of personality—to see others as consistent, simple beings whose behavior in a given situation is readily predictable. This use of "implicit personality theory" is questioned by

about which side to take in a debate, research subjects tend to believe that the debater is arguing the side that he or she actually believes and accepts.<sup>81</sup>

On the other hand, this research is mainly directed toward showing the process by which human beings make social judgments, not the external validity of judgments about character. Attribution error researchers have tended either to ignore the accuracy question, or to assume without actual testing that character attributions are inaccurate.<sup>82</sup> Moreover, some critics have charged that a bias exists in the professional literature in favor of reporting human error—either because it is easier to study, or simply because it makes a better story.<sup>83</sup>

Overall, personality theory probably does lend some support to the idea that character evidence is prejudicial. The research has not achieved, however, the degree of near-consensus that one sees, for example, in eyewitness testimony research, and in any event its generalizability to legal issues is questionable.

A final argument in favor of the existing structure of character evidence rules is that, even if it does not overvalue evidence of character, the jury might use the evidence prejudicially by punishing the accused for the uncharged misconduct. The jury may decide to convict even if it believes the defendant innocent, or it may treat the evidence about the charged incident with abandon, because it

Davies, *supra* note 74, at 528-29, on grounds articulated by Funder—that the social perception research on which it is based was intended to show the process by which social judgments were made, but not the external validity of those social judgments, and that “social perception researchers have tended either to assume that personality assessments are inaccurate, or to ignore the accuracy question altogether.” Davies, *id.* at 529.

<sup>81</sup> In one well-known experiment, for example, subjects were asked to form a judgment about whether a debater favored Fidel Castro. Even if told that the debater had no choice—that the debate team advisor had instructed the debater whether or not to support Castro—the subjects would be more likely to attribute a pro-Castro attitude to the debater if the debate spoke in favor of Castro than if the debater spoke against Castro. See Edward E. Jones, *The Rocky Road from Acts to Dispositions*, 34 *AM. PSYCHOLOGIST* 107 (1979) (describing Castro experiments).

<sup>82</sup> Funder & Ozer, *supra* note 77; Davies, *supra* note 74.

<sup>83</sup> See David C. Funder, *Errors and Mistakes: Evaluating the Accuracy of Social Judgement*, 101 *PSYCHOL. BULL.* 75, 75-77 (1987). One researcher, who has a relatively optimistic view of the ability of humans to make judgments about dispositions, has gone so far as to complain that:

Studies of error appear in the literature at a prodigious rate, and are disproportionately likely to be cited (Christensen-Szalanski & Beach, 1984) . . . (p. 75) [T]he current *Zeitgeist* emphasizes purported flaws in human judgment to the extent that it might well be “news” to assert that people can make global judgments of personality with any accuracy at all. (p. 83).

*Id.*

believes the defendant to be a bad person who deserves to be punished whether or not technically guilty of the charged crime.<sup>84</sup> Recently, one of us was talking with a trial judge about his trials in nonjury cases. He said that for him the question of reasonable doubt was the question whether he could sleep soundly after convicting the defendant. Expressed in terms of decision theory, decision-makers will seek to minimize their expected regret over reaching incorrect decisions.<sup>85</sup> They will weigh the regret they expect from a conviction against the regret they expect from an acquittal. Jurors will experience less expected regret over finding the defendant wrongfully guilty if the jury discovers that the defendant committed other crimes. This argument is sound; the question is how much weight should it be given—is there anything on the other side that outweighs it?

To us, the answer is no. The case against our existing character evidence rule has not been made strongly enough to justify abolishing it or making a major modification by blanket admission of prior sex offenses. Law reform should take the form of a narrower exception for consent defense cases. Alternatively, lawmakers could devise a more modest relaxation of the general rule against character evidence—for example, by providing that character reasoning is generally not permissible, except when there have been repeated accusations in closely similar situations.

As a practical matter, probably all of the arguments that we have mentioned are unimportant in comparison with one's substantive attitude toward sex offenses. If one thinks of rape *as* a crime that is like other felonies—comparable to homicide or armed robbery—then one is more likely to accept the idea that the character reasoning rules should be consistent across various crimes. If one regards rape *as* a society-defining crime—a systemically harmful crime that promotes a society of male dominance and female oppression—then one might think that the need to increase the conviction rate is greater than the need to maintain consistency across the law of character evidence, or greater than the need to avoid speculative dangers of prejudice in the fact-finding process. As usual, attitudes about substance overwhelm attitudes about process.

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<sup>84</sup> See, e.g., Colin Tapper, *Proof and Prejudice*, in WELL AND TRULY TRIED (1982).

<sup>85</sup> See LEMPERT & SALTZBURG, *supra* note 12, at 162 (discussion of prejudice in terms of regret matrix of juro



# THE TENTH ANNUAL GILBERT A. CUNEO LECTURE: THE ROLE OF PROCUREMENT LAWYERS IN THE ERA OF REDUCED DEFENSE SPENDING\*

C. STANLEY DEES\*\*

## I. Introduction

It is no secret that this decade will see great turmoil in government procurement, both in the government and in the private sector, as agencies and companies learn to cope with continually decreasing defense budgets. We also will feel the consequences of increasing industrial concentration, with fewer and fewer companies surviving in the government marketplace, and a concomitant threat to the nations' industrial and technology base. Hard decisions must be made about what can or should be preserved in the interest of national security. The government will have to decide on how, or whether, to help cushion the impact of the substantial dissolution of the defense industrial base that it has built.

Many of these issues are argued daily in the press, the Department of Defense (DOD), and Congress. They are an unavoidable reality of the changing face of national security, and they are not new to us. Today, however, I would like to focus on what I think we as lawyers can and should be doing to help our respective clients cope with the changes that are coming. In particular, how can government lawyers work to protect the increasingly limited resources available to the government without compounding the trauma of the downsizing that is occurring?

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\* This article is a transcript of a lecture delivered by C. Stanley Dees to members of the Staff and Faculty and students attending the 1993 Government Contract Law Symposium on January 11, 1993, at The Judge Advocate General's School, Charlottesville, Virginia. The Cuneo Lecture is named in memory of Gilbert A. Cuneo, who was an extensive commentator and premier litigator in the field of government contract law. Mr. Cuneo graduated from Harvard Law School in 1937 and entered the United States Army in 1942. He served as a government contract law instructor on the faculty of The Judge Advocate General's School, then located at the University of Michigan Law School, from 1944 to 1946. For the next twelve years, Mr. Cuneo was an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. He entered the private practice of law in 1958 in Washington, D.C. During the next twenty years, Mr. Cuneo lectured and litigated extensively in all areas of government contract law, and was unanimously recognized as the dean of the government contract bar.

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## II. The Reality of Downsizing

In fiscal year 1988, the total DOD acquisition budget was \$81.69 billion. The fiscal year 1993 budget contained only \$51.776 billion for procurement, a reduction of over thirty-seven percent. The Army acquisition budget has been reduced by over fifty percent.

These budget reductions already have had a substantial, and occasionally devastating, impact on the defense industry. Hundreds of defense contractors are fighting to win the fewer contracts that are being awarded and to become part of those programs that are expected to survive despite the cuts.

Even greater reductions are expected in the near future. The Secretary of Defense, former Representative Les Aspin, made it clear during the deliberations on the fiscal year 1993 defense budget that he believes greater reductions were possible than had been proposed by President Bush through fiscal year 1997. President Clinton made it clear prior to the election that he also believed greater reductions were possible. Although Secretary Aspin has placed no formal proposals on the table, it reasonably can be expected that he will seek to implement some of his proposals during fiscal year 1993 and thereafter. Thus, there is no avoiding the reality of continued downsizing and the future of a greatly reduced body of government contractors on which the government can rely.

One consequence to be expected is the temptation in both the government and the private sector to pursue disputes more doggedly. Now, more than ever, a lost contract can mean the difference between survival and dissolution for many contractors. Although there are contractors that may engage affirmatively in the downsizing (such as General Dynamics, with its decision to sell off its assets),<sup>1</sup> ingrained competitiveness, lost value in the market, and even antitrust laws will be barriers to easy transition. This trend is already expressing itself in the disputes that appear in the various bid protest forums available to government contractors. The number of disputes has grown as the defense budgets have shrunk.

The problem of downsizing has received considerable attention from industry and Congress in recent years, and many proposals have been and are being made to ease this process. What I would like to do today is discuss the role of the procurement lawyer during these difficult times.

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<sup>1</sup> *General Dynamics' Selling Strategy*, FORTUNE, Jan. 11, 1993, at 56.

### III. The Impact of Downsizing

Early this year, in his analysis of the then-proposed DOD five-year defense plan (FYDP), Secretary Aspin observed that, by the end of the current FYDP, "we will be out of business entirely in several defense industries, and imminently out of business in several others." More specifically, he anticipated that, for example, the total number of airframe programs in production would fall from the 1992 level of twenty-five to sixteen in 1997 and ultimately perhaps to six. Even more devastating were his predictions that the present five guns/cannons programs would fall to zero in the same time frame, hull programs would fall from nine to one, strategic missiles from seven to two, and tactical missiles from twenty to eight.<sup>2</sup> Furthermore, the level at which surviving programs enter production is expected to be much lower, and there will be longer intervals between Pentagon procurement of new systems.

#### *A. Downsizing and Its Impact on the Industrial Base*

Defense companies are facing serious long-term adjustments. The Congressional Office of Technology Assessment has found that defense spending reductions are cutting deeply into programs that defense companies expected to sustain them, threatening their stability or even existence.<sup>3</sup> However, little has been done to address or ameliorate these adjustments.

The Bush Administration made two major mistakes, diametrically opposed in philosophy, regarding the industrial base. First, because of an extreme laissez-faire attitude—an unwillingness to adopt any formal "industrial policy"—the government has not established much in the way of a rational process for downsizing. Second, the Administration (with some help from Congress) continued to maintain and increase the over-regulation that is driving away participation by commercial enterprises as well as any contractor that can move to commercial programs.

Specifically, the Administration has not been sufficiently concerned with four needs:

- The need to encourage advanced, dual use technology research and development;
- The need to maintain production capacities and production skills in certain unique areas;

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<sup>2</sup> Les Aspin, *Tomorrow's Defense from Today's Industrial Base: Finding the Right Resource Strategy for a New Era*, Feb. 12, 1992, at 4.

<sup>3</sup> United States Congress, Office of Technology and Assessment, 624 AFTER THE COLD WAR: LIVING WITH LOWER DEFENSE SPENDING (1992).

- The need to retrain idled defense workers, with the United States bearing a substantial portion of the cost; and
- The need to push actively for an integration between the commercial and the military technology and industrial bases, by reducing the burdens of military clauses and specifications wherever possible.

It is estimated that well over half the number of defense suppliers have disappeared in the last decade, either moving to non-defense markets or out of business altogether.<sup>4</sup> This trend continued under the Bush Administration, which made it quite clear that it would not intervene on behalf of even some of the largest corporations threatened by the cancellation of major programs. Observers have labelled the government philosophy a policy of "Industrial Darwinism," with a reliance on the survival of the fittest that will lead to unpredictable and less-than-ideal results. There appeared to be little inclination within previous administrations to manage effectively or preserve the defense industrial base.

Congress has taken some small steps to cushion the impact, authorizing funds to support conversion of the industrial base. Although several ideas were proposed in the fiscal year 1993 DOD Authorization Act, only a limited program for retraining of displaced defense industry employees and direction to DOD to develop a plan for defense conversion ultimately has survived the legislative process.<sup>5</sup>

President Clinton has recognized these concerns, and has expressed his intention to preserve key elements of the industrial base by identifying the core capabilities that are needed in the post-Cold War security environment for preservation. We have yet to see what this will mean.

## B. The New Competitive Environment

1. Competition with Federal Facilities. — Further adding to the burden of competing for drastically reduced procurement dollars will be increased competition from federal facilities, such as research laboratories, arsenals, and depots. Already we see depots with substantial unused capacity trying to retain more maintenance activity and branch out into manufacturing activity to sustain their

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<sup>4</sup>Douglas P. Beighle, *Defense Contractors—% Next Spotted Owl?*, 24 NAT'L CONT. MGMT. J. 23 (1991).

<sup>5</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 4465, 106 Stat. 2315, 2742 (1992).

own employment levels. There has been consideration of the possibility of building a government-owned plant to assemble the F-22 Advanced Tactical Fighter when it enters production. Procurement lawyers will be faced with more and more complicated questions on the subject of contracting out—questions such as, can a contract be terminated solely to allow an underutilized government facility to take over the work?

Continuing to contract out spare parts and depot maintenance, however, is one significant way that the DOD could continue to support the industrial base without having to subsidize it. One innovative approach being tested by the Army is to team up its ammunition-making and equipment maintenance depots with private contractors to act as subcontractors.

**2. Bid Protest Forums for Heightened Contractor Competition.**—A careful analysis suggests that bid protest activity will not decrease as contractors struggle to maintain a toehold in a diminishing market. Contractors may well be inclined to protest more often than they would have in the heyday of government contracting, when there was always another program around the corner. In this regard, we must note that the Section 800 Panel will make major recommendations on streamlining the bid protest process. While the final report was not due to Congress until January 15, 1993, the last public version of this proposal was very interesting. It recommended the establishment of a single administrative bid protest forum, consolidating the activity now seen at the General Accounting Office (GAO) and the General Services Administration Board of Contract Appeals (GSBCA), with two tracks available to protesters. The first, to which all protests under \$100,000 would be submitted, would be an informal track resembling the protest process at GAO, and the parties would rely primarily on the procurement agency record. The second track would be an option for procurements in excess of \$100,000, and would provide adjudicatory reviews similar to the GSBCA protest process. The last available version of the proposal also recommended the elimination of *Scanwell* bid protest jurisdiction in the federal district courts, consolidating all judicial bid protest jurisdiction in the (newly-renamed) United States Court of Federal Claims. Aside from the question of whether Congress will want to remove district court jurisdiction or replace GAO jurisdiction, we must all give some thought to the resources required to protest and defend awards of contracts and whether protests are the most efficient use of attorney resources.

Speaking very frankly, two of the problems that produced the present situation were the inadequacies of the bid protest remedies available at GAO and within agencies. GAO has taken several impor-

tant steps to improve discovery and factfinding so that a GAO protest is less of a sure bet for the government than it was several years ago. On the other hand, the agencies have not heard the message. Although the American Bar Association Section of Public Contract Law urged the DOD and the Federal Acquisition Regulation (FAR) Council to create a more meaningful bid protest remedy within the procurement agencies, the FAR and Defense Acquisition Regulation (DAR) Councils did nothing. I am convinced that if there were a quasi-independent review within the procurement agencies, staffed by procurement and procurement law experts and accompanied by suspension rights equal to those in the GAO or the GSBCA, a significant number of protests would be resolved within the agencies.

### *C. The Risks of Forthcoming Terminations and Cancellations*

We are all aware of major recent program terminations and cancellations. Some of the terminations have been for default, and others have been for convenience. Realistically, however, more can be expected because downsizing now plays a role in termination and cancellation decisions. Accordingly, we as procurement attorneys are once again becoming familiar with the law of contract terminations. This time around, however, the task is complicated by the significant investments that contractors were required to make in some programs in the past decade.

In the mid-1980s, Secretary Lehman and others espoused a principle called “cost sharing.” Arguably, the practice of encouraging contractors to invest money in programs, in the hope that it would be recovered on future production contracts, was illegal. Regardless of the answer to that question, the termination of these programs has left many contractors with significant losses due to investment required by the government. It is not a satisfactory answer in this situation for the government to respond—either as sovereign or as a representative of its citizens—that contractors knowingly took that risk and must face the consequences of a bad business decision. That government, standing for “We the People,” wanted those contractors to perform those programs and still wants an industrial base composed of many of those same contractors. Accordingly, it has an elementary duty to approach these situations with a sense of fairness.

It does not take much imagination to allow recovery of some of those investment costs as precontract costs under FAR § 31.205–32, or termination costs in the nature of loss of useful value under FAR § 31.205–42. Additionally, government contracting officers and procurement attorneys should take full advantage of FAR § 49.201(a), which provides that “[a] settlement should compensate the contrac-

tor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly." As one example, in some cases an investment may not be recoverable directly, but an extraordinary allowance for profit due to the risk taken would be appropriate. There are also decisions from the courts and boards which relax somewhat the strict standards of allowability for convenience termination settlements. If we are to preserve the industrial base, fairness must be our watchword. It is very easy for the termination contracting officer and his or her attorney to rely comfortably on the most strict interpretation of a clause or regulation. It will take more courage and vision to achieve fairness and justice, and these extraordinary times require both.

In a few instances, we can expect litigation because of an agency's violation of section 8118 of the DOD Appropriations Act of 1988. This section restricted the obligation or expenditure of funds for fixed priced contracts in excess of \$10 million for the development of a major system unless the Under Secretary of Defense for Acquisition formally determined that program risk had been reduced to the point where realistic pricing was possible and that the contract represented an equitable and sensible allocation of program risk between the parties. The wording of section 8118 addressed the use of funds rather than the timing of the funds; thus the restriction was applicable even to contracts entered into prior to 1988 if they used funds appropriated in 1988. Substantially similar provisions have appeared in all subsequent defense appropriations acts. In many cases, DOD agencies did not comply with the requirements of section 8118 and its successors. As a consequence, the funds used for some projects were not properly available.

Any new contracts entered into in violation of section 8118 also violated the Antideficiency Act, which prohibits entry into contracts where there is not adequate funding. Accordingly, contracts awarded in violation of section 8118 are void.

As procurement attorneys, we will be dealing with questions of whether contracts are void *ab initio* or voidable, and with the ancient concept of recovery of contract costs under theories like *quantum meruit*. Alternatively, the parties may attempt to reform the contract based upon a theory of mutual mistake concerning the possibility of achieving the goals in the development contract. What we should try to avoid is arguing over entitlement in cases where our basic sense of fairness tells us that the government attempted to shift too much technical and cost risk to the contractor.

Eleanor Spector, Director of Defense Procurement, addressed

this subject when she spoke to the DOD Procurement Conference in March 1991. She acknowledged that, in the mid-1980s, some DOD officials sought to solve problems associated with defense budgets by inappropriately shifting cost and technical risks to contractors on major systems programs. Specifically, in 1985, the Secretary of the Navy attempted to address the problems of cost growth on weapon system development programs by prohibiting contracting for full scale engineering development on *other than* a fixed price basis without Secretarial approval. Ms. Spector noted that the country experimented unsuccessfully with the same philosophy in the late 1960s and that it had learned, in the aftermath of that experiment, that fixed priced contracting for something we have not seen and do not really know can be produced will bring about "terrible trouble." Ms. Spector acknowledged that the fixed priced research and development policy was recycled in the mid-1980s, and now we are reaping the same kinds of trouble that we saw in the mid-1970s.

As lawyers, it will be our duty to do everything we can to avoid the debilitating experience of huge claims involving hundreds of auditors, procurement specialists, and attorneys, which eventually are settled on some global basis many years too late. In the interest of preserving the industrial base and in the interest of efficient use of procurement resources, we must all be sufficiently innovative and courageous to settle these issues in the early stages.

#### *D. The Impact of Downsizing on Claims*

Following up on that theme, I believe we are seeing an increase in claims much akin to that which we saw in the early 1970s. Whether connected to major weapon systems programs that are now in trouble or are terminated, or simply arising from more garden variety contracts, we are experiencing, and will continue to experience, increased claims activity.

We will argue about the familiar concepts of cause and effect—whether certain government actions or inactions actually caused additional work or had an impact on unchanged work. We will revisit the once familiar ground of equitable adjustments for changes where there is a significant amount of intertwining between changed work and unchanged work. This will require us to refine our thinking on such concepts as total cost recovery and the much more acceptable practice of limited or modified total cost recovery. We surely will revisit many times over the proper application of the case law, such as *Eichleay*, as we try to identify and measure the recovery of unabsorbed overhead and other difficult-to-define costs.

We as procurement lawyers should be educating a new generation of clients on how to avoid the pitfalls of the raw and unsup-

ported use of the total cost or jury verdict approach to claims. We should teach them how to make those approaches or some modifications thereof acceptable either for the purposes of settlement or decision by a tribunal.

Again, creativity and courage will be required in addition to old-fashioned research. The law clearly permits substantial recoveries in the absence of good accounting and job records proving entitlement to every penny. Creative lawyers know what combination of records, engineering estimates, Program Evaluation and Review Technique (PERT) charts, and learning curves will produce an equitable adjustment. We may not be comfortable with the knowledge that our result is not precisely correct; rather, we should be comfortable that we achieved an equitable—read that as fair and just—result early in the process and avoided long-term litigation which might bring about the bankruptcy of one more company heretofore participating in the industrial base.

#### ***E. The Impact of Downsizing on Environmental Liability***

At times, downsizing will require the closure of a facility. As you know, there are a variety of environmental obligations that must be satisfied prior to, or concurrent with, the closure of a facility. For example, the Resource Conservation and Recovery Act (RCRA) will require the closure of impoundments or landfills and the remediation of on-site contamination. Special rules will apply to the decommissioning of underground storage tanks. At times, assessments will have to be conducted to determine whether soil or groundwater has been contaminated. In all cases, contractors must accompany such audits and assessments with careful record keeping in order to avoid or limit liability at some later point in time. Since the United States may own the facility or some portions thereof, it, too, must act as a potentially responsible party and do all the things that contractors have been learning to do over the past few years.

As lawyers and as persons involved in procurement policy, we will struggle with the question of who must pay for this cleanup. Paying little attention to the demagoguery emanating from the halls of Congress or editorial pages, we must again face this question from the point of view of basic fairness and justice. If contractors were negligent in their handling of hazardous or toxic materials, the government can argue that it bears no responsibility. On the other hand, if the contamination and the cleanup flows naturally from the normal operation of the facility under the norms of that time, those costs were clearly a cost of doing business in the course of producing weapon systems for the United States. Why should the contractor, or worse yet, a successor (or rather the shareholders of these com-

panies), pay for costs which may have been inseparable from the other costs of producing goods for the government? In the name of fairness, as well as in the hope of maintaining a defense industrial and technology base, the government must stand by contractors in these situations and bear a proportionate share of the costs of cleanup.

*F. The Impact of Antitrust Restrictions on the Downsizing Process*

One necessary result of reduced federal acquisition spending will be the ongoing, and sometimes painful, restructuring of the defense contracting sector of the United States economy. Defense contractors face a narrow range of long-term survival options: survival as defense contractors (a chancy option probably not available to many); conversion to commercial activity; or bankruptcy. With fewer and fewer programs beginning or going into production, companies and divisions that prospered in the 1980s are facing acquisition or, in the worst case, bankruptcy.

The merger trend is expected to head upward again in response to the shrinking business base, focusing on horizontal mergers among prime contractors.<sup>6</sup> Some analysts expect the final outcome to look somewhat like the European defense contracting picture, where merger activity in the 1980s resulted in a small number of surviving national defense firms with virtual monopolies in their specializations.

Recent examples of the coming trend include Martin Marietta's \$3 billion agreement to acquire General Electric Company's aerospace unit, and the merger of FMC Corporation's Defense Systems Group with Harsco Corporation's BMY Combat Systems Division. Earlier in 1992, Loral purchased LTV's missiles unit, and the Carlyle Group and Northrop acquired LTV's aircraft division. General Dynamics, rather than following the merger route, has elected to sell its profitable divisions to its competitors, again increasing the consolidation of defense contracting resources.

This activity faces a significant barrier, however, in United States antitrust laws, one that threatens the orderly transition to a smaller but still healthy industrial base capable of supporting future defense needs. Simply put, and there are many articles that discuss this in greater detail, the antitrust laws are being applied to defense contractors as if they, like most commercial contractors, operated in an open competition-driven environment. Relying upon this assumption, enforcement efforts—particularly at the Federal Trade Com-

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<sup>6</sup>William E. Kovacic, *Merger Policy in a Declining Defense Industry*, 36 ANTI-TRUST BULL. 543 (1991).

mission (FTC)—assume that *any* reduction in competition caused by a proposed merger or acquisition is harmful, and therefore prohibited under the law. Unfortunately, sensible mergers and acquisitions undertaken due to reduced government procurement are almost by definition going to reduce competition.<sup>7</sup>

A recent and compelling example is the failed merger of Alliant Techsystems and two Olin Corporation divisions (Ordnance Division and Physics International). The FTC, in its review of the proposal, focused on the fact that Alliant and Olin were the only two suppliers of 120mm tank ammunition. However, the Army already had determined that it could no longer support two suppliers in the industrial base for these shells. After the next acquisition, the Army expected the winner to be the only future supplier of 120mm shells, no matter what happened. Despite this argument from the parties and the Army, and explanations that the specialized nature of government procurements and the oversight of Army acquisition personnel would ameliorate the anticompetitive effects of the merger on the next contract award, the FTC and the United States District Court for the District of Columbia found the proposed merger anticompetitive and enjoined it.<sup>8</sup>

The analysis applied by the FTC and the district court, however, ignores the reality of government (particularly defense) procurement. Contractors are not subject to open competition for contracts, but rather operate in a monopsonistic marketplace largely controlled by their customer, the government. Due to the specialized nature of its products, this market also has always had limited (oligopolistic) competition in many areas, with limited price elasticity in response to quantity fluctuations. Competition and the “free market” are not predominant characteristics of the government market. The present antitrust analysis unfortunately gives only cursory recognition to the control the United States Government has over its suppliers, and in particular the specialized rules and procedures that have been developed to minimize the government’s recognized inability to ensure competition to meet its needs. The most obvious of these tools is, of course, the Truth in Negotiations Act, and the various audit clauses and civil and criminal penalties that facilitate its enforcement.

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<sup>7</sup>See Richard McMillan, Jr., *Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopsonist*, 14 PUB. CONT. L.J. 262 (1984); Wm. Randolph Smith & Robert J. Reynolds, *The Military Build-Down Meets the Antitrust Build-Up: An Argument for Managed Consolidation*, 58 Fed. Cont. Rep. (BNA) 765 (Dec. 28, 1992); Beighle, *supra* note 4.

<sup>8</sup>Federal Trade Comm’n v. Alliant Techsystems Inc., Civil Action No. 92-2499-LFO, Memorandum and Order (D.D.C. Nov. 18, 1992).

The threat of injunctions against such transactions means that, where there remains even minimal competition today, it will be difficult to make a rational realignment of assets, knowledge, and capabilities to protect the industrial base and reduce disruption to already endangered contractors. Although two contractors may have different strengths whose joint preservation would best serve the interests of the government, they now are expected to compete until one no longer can do so, either retiring from the field or even going bankrupt. In the worst case, even the survivor will be weakened significantly by this behavior.

There also are potential hidden costs to the DOD, as it may eventually have to step in to support the winner (weakened by the steps taken to best its competitor) or to fund improvements that a cheaper but less innovative or flexible contractor no longer can provide. There is also the likely litigation over the final competitive award, and the burden and delays required to deal with congressional concerns over employment losses.

There is a need to craft a more rational antitrust enforcement policy for government contractors that takes into account the realities of the government marketplace. We are haunted by the question of whether more aggressive application of government contracts law would have brought about a different result in the Alliant-Olin case. If not, the law must be changed. We, as procurement lawyers, must educate and advocate until these truths are understood.

#### IV. Procurement Lawyers Can Work Actively to Preserve the Industrial Base

As noted above, there are a number of barriers to contractors wishing to serve both the commercial and the government marketplace. This move is, however, one of the few options open to contractors seeking to ensure their survival with greatly reduced reliance on government contracts.

The normal barriers include the large overhead burden necessary to sustain the infrastructure required of a government contractor, unique equipment and skills, and reporting obligations. These represent burdens not applicable to their purely commercial competitors, the effect of which must be addressed in the restructuring necessary to enter commercial markets. Recent trends in government contract regulations and enforcement, however, will make such a transition even harder.

### *A. Differing Accounting Treatment*

One of the most significant trends impairing transition to the commercial marketplace is the growing tendency to ignore Generally Accepted Accounting Principles (GAAP) in favor of government procurement and payment policy goals. Generally Accepted Accounting Principles rules are intended to reflect the economic substance of business events, while government contract cost accounting policy has shifted its focus to what the government is willing to pay for.

In recent years, the boards of contract appeals, the federal courts, and the Cost Accounting Standards (CAS) Board have contributed to this trend. Unfortunately, the trend has rendered government contract cost accounting uncertain and has impaired contractors' abilities to earn profits and raise capital, which are necessary functions in an era of decline. Moreover, continuing divergence from GAAP will adversely affect the government's ability to shift its reliance more to the commercial marketplace.<sup>9</sup>

Most significant is the determination to refuse to recognize step-ups in asset value because of a business combination. Such costs are not allowable under FAR § 31.205-52, and the CAS Board is considering issuance of a standard with the same purpose. Step-ups are, however, in accordance with GAAP, eminently reasonable, and absolutely necessary if we are going to finance and maintain the industrial base.

Given the likelihood of more plant closings due to business consolidations and failures, the FAR rules limiting recoverability of costs for idle facilities<sup>10</sup> are a further burden on contractors and yet another failure to recognize the realities of the future government marketplace. This policy also threatens preservation of the industrial base, because it encourages abandonment or sale rather than maintenance of facilities for which the government may have a long term need.

### *B. Procurement Policy Barriers*

Legislation and regulations applicable to DOD acquisition create a wall between defense and nondefense/commercial research, development, and production. Most companies design, develop, and manufacture defense and nondefense products in separate plants and divisions. The same division affects our research laboratories. Materials, components, and subsystems of even unique military

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<sup>9</sup>See Thomas A. Lemmer & Janice Davis, *GAAP & Government Contract Cost Accounting: A Survey of Theory and Practice*, 92-11 CP&A Rep., Nov. 1992, at 3.

<sup>10</sup>GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.206-17 (24 Sept. 1992) [hereinafter FAR].

products often have commercial counterparts. Separation results in higher prices to the DOD and no broad domestic production base to meet the DOD surge requirements.

The Center for Strategic and International Studies (CSIS) concluded in a recent study<sup>11</sup> that there are four areas of legislation and regulation which “drive a wedge” between military and commercial production:

- Accounting requirements and audits (referred to above), which cause higher dollar costs and make commercial businesses unwilling to do business with government.
- Military specifications and standards, which are intended to ensure high reliability and performance, but define what is required and *how* to build it so that commercial products that may exceed military requirements cannot be substituted by contractors.<sup>12</sup>
- Technical data rights, which the DOD considers necessary to operate, repair, and maintain equipment and to prevent price gouging. However, to protect their data rights, some firms do not incorporate commercial technologies into their DOD products. Also, firms are reluctant to exploit the commercial opportunities presented by defense-supported technologies because it is not profitable, as any other company also can exploit them.
- Unique contract requirements, including hundreds of unique federal contract clauses.<sup>13</sup> Public funds are involved, so controls are required, but current contract requirements result in inefficiency and high administrative costs as compared to commercial contracts following UCC requirements, and civil and criminal statutes present unacceptable exposure for alleged violations of rules unrelated to product quality or production efficiency.

In order to encourage more reliance on commercial products,

<sup>11</sup>Center for Strategic and International Studies, *INTEGRATING COMMERCIAL AND MILITARY TECHNOLOGIES FOR NATIONAL STRENGTH: AN AGENDA FOR CHANGE* (1991).

<sup>12</sup>*Id.* at 43. The Center for Strategic and International Studies (CSIS) study observes that the DOD Index of Specifications and Standards lists about 50,000 acquisition documents, of which 34,000 are military specifications and standards.

<sup>13</sup>*Id.* at 65. For example, DOD fixed price contracts can potentially include 173 FAR clauses and 439 different solicitation or contract provisions in the DOD FAR Supplement, 25 clauses in the Air Force (AF) FAR Supplement, 76 clauses in the Army FAR Supplement, 7 clauses in the Navy FAR Supplement, and 25 clauses in the Defense Logistics Agency (DLA) FAR Supplement. The DOD has reported that there are 11,000 different contract clauses in use at various levels.

the government should maintain only a few defense-unique sectors for technologies specific to defense—such as nuclear weapons. For other needs, the government should link up with the commercial sector for research and development and acquisition of materials, components, and equipment. Facilities and technology should not be divided by end-user, but combined.

We must be active and must take affirmative steps to remove the major obstacles to integration cited here. The burden of the accounting and audit requirements can be lessened by at least three techniques: a broadened definition of commercial products and commerciality (to encourage more commercial firms to participate in defense business); the exemption of competitively procured research and development and products from the requirement to submit cost or pricing data; and the encouragement of the use of price analysis (rather than cost analysis) as a test of pricing fairness.

Military specifications and standards should be phased out. The fundamental reasons for continued reliance on these rather than use of commercial alternatives are a lack of a bureaucratic mandate to do so, a lack of incentives to change, and the “security” of relying on detailed specifications rather than form, fit, and function specifications. The Competition in Contracting Act and the FAR should be revised to make even stronger the preference for commercial products, nongovernment specifications, commercial item descriptions, and form, fit, and function specifications.

Rights to technology or software should belong exclusively to contractors, regardless of funding. The government may acquire rights by negotiation, but government purpose license rights should provide the DOD with only the limited rights needed to install, maintain, and repair its systems, and should constrain (but not prohibit) the DOD from circulating data to competitors for reprourement. Unlimited rights should be acquired only for very specific purposes.

The burden of unique contract requirements also can be minimized. Once a product or manufacturer has met the test of commerciality, procurement of that product from that source should be exempted from government-unique regulations that are inconsistent with the Uniform Commercial Code (UCC). The mandatory flow-down of clauses to subcontractors on such programs also should be reexamined, and clauses which are not consistent with commercial practice should be waived,

### *C. Appropriate Contract Types*

Over the past thirty years, the DOD has periodically “rediscovered” fixed-priced development contracting, but each time we

have forgotten the painful lesson. However, the rules today are clear. The Department of Defense Directive 5000.1 speaks specifically to an equitable and sensible allocation of risk. The instruction from the Secretary of the Navy to which I referred before, SECNAV Instruction 4210.6, which led invariably to the failure of a number of programs, violated that DOD Directive. Where were the procurement lawyers who should have pointed out that the Navy instruction was flawed from both a legal and a historical (practical) viewpoint?

Congress has been relentless on this issue, forbidding with section 8118 of the 1988 DOD Appropriations Act and section 8038 of the 1991 DOD Appropriations Act continued implementation of the policy. Federal Acquisition Regulation § 16.104 and DFARS § 235.006 are similarly very clear on the subject. It is the duty of procurement lawyers, and especially government procurement lawyers, to implement procurement laws and procurement regulations. It was not until 1991, however, under the jurisdiction of Betti and Yockey, that full implementation finally became general practice.

As the shrinkage in the defense budget becomes more painful, will the new Administration be tempted once again to transfer undue risk to contractors? At that point in time, will we as procurement lawyers stand up and be heard? Next time, can we see the folly and confront the policy makers before we breed another round of massive claims and cancellations?

#### V. The Duty of Procurement Lawyers to Conserve Legal, Administrative, and Judicial Resources

Professor Nash, when he spoke to this conference in 1990, made a troubling observation that corresponds to one of my own: when he and I were young lawyers, approximately ninety percent of our work was contract disputes (claims). Professor Nash also stated that now, as a rough approximation, only one third of our practice is disputes. Another third is bid protests, and the balance is criminal investigations, suspensions and debarments, and other activities related to fraud.

Both the public and private bars must share responsibility for the proliferation of government contracts litigation over the last decade. Reduced defense spending has in many cases increased the pressure either to challenge questionable contract award decisions or to pursue contract claims. These pressures have caused an apparent increase in the amount of litigation of bid protests and contract disputes. Moreover, my own experience and consultation with my colleagues leads me to believe that the litigation of the protests and

disputes has intensified, with more motions and more contentious discovery activity.

We have an obligation to tell our clients when we believe that their claims or protests lack merit. Law firms in general are under increasing pressure not only to be more cost efficient, but also more "litigation-efficient."<sup>14</sup> The government lawyer has a concomitant responsibility to advise his or her client when it appears a legitimate protest or claim issue has been identified, and to minimize litigation costs and procurement delays. I believe we are seeing too many instances of procuring agency decisions to send the matter to litigation so that it is decided later, on someone else's watch, and perhaps with some other pot of money. At any time, that is a very dubious policy. In these times, we might call it reprehensible.

#### *A. Reducing Disruption by Bid Protests*

We must work together over the coming years to streamline the bid protest process and reduce its impact on the use of legal and judicial resources. The recent recommendation of the Section 800 Committee may not be the correct one, but the present system is not as good as we can make it. I continue to believe, as I have for many years, that one key to improvement is a real administrative protest remedy. In the absence of that opportunity for agencies to resolve the clearly erroneous situations before they "go the full nine yards" in some other forum, the only remaining safeguard is the government lawyer. It is the government procurement lawyer who must say to his or her client: "This one is not worth our time and resources."

#### *B. Needless Litigation over the Definition of a Claim*

Another area with which I am particularly concerned is the pursuit of what I regard as needless and wasteful litigation over the definition of a "claim." By this I refer to efforts to limit, through the regulatory implementation of the Contract Disputes Act (CDA), the circumstances under which a legitimate claim can be presented for decision and may then be appealed. During the past year we have seen two such arguments resolved legislatively, but only after the expenditure of massive litigation resources and loss of, in some cases, years of prior litigation. This wastefulness arose from narrow definitional challenges of technical details regarding otherwise perfectly legitimate claims against the United States government, regarding precisely who may certify a claim and how to appeal a nonmonetary contract dispute.

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<sup>14</sup> See Ellen Joan Pollock, *Grudgingly, Lawyers Try 'Total Quality,'* WALL ST. J., Dec. 2, 1992, at B1.

During the period from January 1, 1990, through July 21, 1991, the courts and boards decided eighty-seven cases on purely technical and procedural grounds relating to certification. In not one of these cases did the reviewing body reach the merits regarding the veracity of the claim. Additionally, most claims appellants, during that period, were required to invest the resources to demonstrate in some manner the validity of the certificate in support of their claims. These disputes did nothing to further the analysis of the underlying claim, which is the focus of the CDA and, accordingly, considerable wasteful and senseless litigation occurred.

In one recent year, for example, the Armed Services Board of Contract Appeals (ASBCA) reported that fully one-third of its decisions dealt with certification issues. Thus, through the 1980s, the dockets of the courts and boards were clogged with technical certification disputes.

Litigation over technical certification issues reached a low point in 1991 with the Federal Circuit's decision in *United States v. Grumman Aerospace Corporation*.<sup>15</sup> *Grumman* held that a corporation's senior vice president and treasurer, the senior financial officer of the corporation, was not sufficiently "in charge" and therefore could not certify a claim on behalf of the contractor. The eligibility criterion in question did not arise from the statute, but only from the implementing regulations. Litigation nonetheless ensued over every aspect of the regulatory certification requirements, as interpreted in *Grumman*, such as the definition of "primary responsibility" and what degree of physical presence "at" the contractor location was required.

In response to this judicially created problem, the Federal Courts Administration Act (FCAA)<sup>16</sup> amended section 6(c) of the CDA to provide that any defect in the certification of a claim will not deprive a court or agency board of contract appeals of jurisdiction over that claim. The FCAA thus makes it clear that technical certification requirements are no longer a prerequisite for Court of Federal Claims (Claims Court) or board jurisdiction over the claim. Fortunately, the certification provisions are effective for all pending or future claims except those which have been appealed to a court or board of contract appeals.

A parallel dispute, also resolved by the FCAA, involved the Federal Circuit's ruling in *Overall Roofing & Construction, Inc. v.*

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<sup>15</sup> 927 F.2d 575 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 330 (1991).

<sup>16</sup> Pub. L. No. 102-572, 106 Stat. 572 (1992).

*United States*,<sup>17</sup> which threatened to create as much confusion and delay in the disputes process as had the certification issue. The Federal Circuit held that the Claims Court had no jurisdiction over cases disputing a termination for default if they were not accompanied by a claim for money presently due and owing. The decision created a disparity between the jurisdiction of the Claims Court and that of the agency boards of contract appeals, as the boards do have jurisdiction over contract cases that are not accompanied by a monetary claim, such as an appeal of a default termination. The decision caused considerable uncertainty about the effectiveness of the two forums that the CDA supposedly provided as equal avenues for the appeal of contract disputes. The FCAA ended this confusion by amending the jurisdiction of the Claims Court in the Tucker Act to include “a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes.”

These changes in the FCAA should remove long-standing impediments to the efficient and expeditious resolution of contractor claims under government contracts without harming the government. The government’s legitimate interest in requiring certification of claims is still fully protected and the CDA certification requirement is still in effect. In cases of a merely technical defect in the certificate, however, contractors may now be assured of court or board jurisdiction and a hearing on the merits of the claim. Likewise, the FCAA restores Claims Court jurisdiction over government contracts disputes even when there is no pending claim for money presently due and owing. This Tucker Act Amendment restores the proper balance between the Claims Court and the Boards of Contract Appeals, as originally intended by Congress when it enacted the CDA.

Having two needless disputes concerning the definition of a claim resolved, it is dismaying, but perhaps not surprising, to see that there is yet another hypertechnical challenge growing which may conceivably become the newest weapon to deprive the boards and the Claims Court of jurisdiction over otherwise legitimate appeals. The source of this dispute will be the issue of contractor adherence to the formalities required to convert a request for equitable adjustment into an actual claim—such as determining when an actual disputed claim arises that can then be appealed. The issue has been developing for a number of years, ever since the FAR was amended to make a clear distinction between requests for equitable

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<sup>17</sup> 929 F.2d 687 (Fed. Cir. 1991).

adjustment and claims. Within the past two years, however, it has begun to be used actively to reject claims. The cases revolve around a technical examination of when precisely an issue was "in dispute," and the assertion that the mere submission of a request for equitable adjustment and pursuit of fruitless negotiations, even if a certificate has been submitted, is not a "dispute" until it is clear that an actual impasse has been reached.<sup>18</sup>

This cascade of technical issues reinforces my belief that we need to bring more common sense to this process. In all of these areas, I question the government's approach on legal and policy grounds. What goals are served by delaying resolution on the merits? Are they worthy goals for our government?

*C. Attempting to Emerge from the Era of the Fraud, Waste, and Abuse Campaign*

We entered a dark era in the early 1980s, when industry made some mistakes and, indeed, occasionally misbehaved, and the DOD and Congress responded with a huge campaign to combat fraud, waste, and abuse. Indeed, there were instances of fraud and of large profits, often with regard to spare parts. On the other hand, Congress and the press continually overstated these problems. As Eleanor Spector explained to a DOD audience in 1991, the \$600 toilet seat was not a toilet seat but an entire aircraft toilet unit designed and built to special military specifications. Even the commercial equivalent ranged in price from \$400 to \$600. In one year, the DOD bought 87,000 hammers of various types for prices between \$6 and \$8 and one hammer for \$435. At the time that then-President Reagan and Secretary Weinberger were asking for huge military budgets, both promised Congress that they would achieve huge savings through an active campaign against fraud, waste, and abuse. Accordingly, Congress and the public expected that the DOD would locate hundreds of instances of fraud, waste, and abuse and save hundreds of millions of dollars.

The government had made a pact with the devil, and we were all losers. As Ralph Nash discussed last year in the *Nash & Cibinic Report*,<sup>19</sup> the DOD Inspector General data for fiscal year 1991 indicate that the total operating cost of the DOD audit and investigative activities was \$1.24 billion. This paid for approximately 21,000 peo-

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<sup>18</sup>See *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991); *Sun Eagle Corp. v. United States*, 23 Cl. Ct. 465 (1991); *Cubic Corp. v. United States*, 20 Cl. Ct. 610 (1990); *Oman-Fischbach International (Joint Venture)*, ASBCA No. 41474, 91-2 BCA ¶ 24,018, *aff'd*, 91-3 BCA ¶ 24,141.

<sup>19</sup>*Criminal Convictions of Defense Contractors: The Inspector General Reports*, 6 NASH & CIBINIC REP. ¶ 25 (1992).

ple performing both contract audit and investigations and internal investigative work within the DOD. The reports state that this investigative activity resulted in recovery of only approximately \$520 million through judicial and administrative actions.

At first, the leading subjects for civil and criminal fraud investigations appeared to fall in the area of cost charging. Then defective pricing rose to the fore. More recently, it appears that testing and product substitution are at the forefront. However, we may be spending more, both in terms of money and human resources, than the fraud, waste, and abuse campaign merits in 1993. Much has happened since 1985 in the area of self-governance, education on ethics and substantive issues, hotlines, ombudsmen, and internal audits. By no means do I wish to say that fraud has vanished, but certainly among the major contractors, the extent of self-governance and voluntary disclosure is extraordinary, and the time has come to reduce both the atmosphere of confrontation and the diversion of scarce resources.

Just as we may be turning the corner in relations between contractors and the government in the fraud arena, a new threat has appeared on the horizon. We are all now suffering from the unwise amendments to the Civil False Claims Act with regard to *qui tam* actions, in particular the provisions which permit *qui tam* relators to proceed without any restrictions, even when the Department of Justice has decided not to enter the suit. Also at fault is the provision that permits suits and full recovery even though the relator had a role in the investigation or could have called attention to the problem as a loyal employee but failed to do so. The self-governance mechanisms beginning to take hold involving education, internal audits, hot lines, and voluntary disclosure are tremendous engines of protection for government interests. We have managed to provide an incentive to many contractors to be far better policemen and auditors than government employees can ever be. We did this first with the guidelines affecting present responsibility. We have reinforced this with the sentencing guidelines. Now is the time to provide further incentives and reward that behavior by curtailing the counterproductive activity of *qui tam* relators.

This is not just a song being sung by a representative of private industry. You can hardly find a government attorney involved in the area of civil or criminal false claims or suspension and debarment who does not have his or her story of frustration over the inappropriate activities of *qui tam* relators.

What is the procurement attorney's role? In all of the areas of attack on suspected fraud, procurement attorneys can play a special role. Who else can or should be telling an investigator, an auditor, or

an Assistant United States Attorney whether a procurement law or regulation has been violated?

## VI. What is the Responsibility of the Government Procurement Attorney in this Environment?

The situation outlined here presents challenges not only for Congress and DOD policy makers, but also for government counsel. Reduced defense spending will call upon the talents of both private and government counsel to handle difficult disputes involving weakened contractors, with far fewer resources than in the past. This reality will demand the best of counsel, both as advocates and as representatives of the public.

### A. *The Thornburgh Memorandum*

In recent years, competing views have been expressed about the role and duties of government lawyers. I refer, of course, to the policy statement issued by Attorney General Thornburgh in 1989, declaring that Justice Department litigators were not bound by Model Code of Professional Responsibility DR 7-104 concerning contacts with persons represented by counsel, or indeed any other provisions of the Code of Professional Responsibility. This declaration provoked outraged responses from the private bar, as it contradicted long-standing principles governing lawyers' ethical behavior and indeed the specific ethical principles of the various state bars by which the government lawyers in question were regulated. More recently, the Department of Justice has narrowed the focus of what the Attorney General was trying to achieve, abandoning the improvident attempt to reject the Code of Professional Responsibility in general, and instead focusing on the limited prosecutorial goals served by reserving the right to speak to persons otherwise represented by counsel, without notifying counsel.<sup>20</sup>

The Thornburgh memorandum, however, highlighted a particularly troubling issue. In its focus on the prosecutor's supposed higher duty to pursue criminal activity on behalf of the government, it illustrated a broader pattern of government lawyers focusing solely on their role as advocates and neglecting their responsibility as public representatives to seek an outcome that is just and fair.

### B. *Balancing the Roles of Advocate and Public Representative*

You have all heard of Gilbert Cuneo, one of the founders of McKenna & Cuneo, and his work to develop the practice of govern-

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<sup>20</sup> See 57 Fed. Reg. 54,737 (1992).

ment contract law. The experiences of another of the firm's founders, Homer Cummings, brings some illumination to this issue. Mr. Cummings, who served as Attorney General of the United States from 1933 to 1939, was a prosecutor for the State of Connecticut in the 1920s. He prided himself on his ability to "temper professional zeal with humanity and a search for truth," and liked to recall the balancing of these competing goals in one of his memorable early litigation experiences. In *The State v. Harold Israel*, Cummings, acting as prosecutor, possessed a confession, sufficient evidence, and faced considerable local feeling against a murder defendant.<sup>21</sup> Although the information available to him would have made a victory probable, Cummings became convinced of the defendant's innocence and declined to pursue prosecution. In this case Mr. Cummings found that, despite his duty as an advocate (and tempted by almost certain victory), his duty as a public representative prevented further prosecution of what he believed to be an innocent man.

A few years later the Supreme Court expressed a similar perception of the responsibility of government attorneys. In *Berger v. United States*, the Court stated that "[i]t is as much [the duty of the United States Attorney] to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>22</sup>

This responsibility is not limited to criminal prosecutions. With regard to the more general duties of the government lawyer, Model Code of Professional Responsibility EC 7-14 provides:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the *responsibility to seek justice and to develop a full and fair record*, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.<sup>23</sup>

Disciplinary Rules 7-102 and 7-103 also express these concepts.<sup>24</sup>

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<sup>21</sup> See CARL BRENT SWISHER, *SELECTED PAPERS OF HOMER CUMMINGS* xi (1939).

<sup>22</sup> 295 U.S. 78, 88 (1935) (emphasis added).

<sup>23</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1980) (emphasis added).

<sup>24</sup> Rule 1.13 of the Model Rules of Professional Conduct regarding representing an organization as a client also explores this balancing of responsibilities in the representation of a government agency. The comment to the rule observes that

These rules apply equally to attorneys in private practice and to government lawyers, notwithstanding the initial Thornburgh pronouncements.

It is in light of the foregoing that I have observed the ever-escalating level of contentiousness in government contract disputes, not just between contracting officers and contractor personnel, but also among their counsel. The painful restructuring that downsizing is causing is unnecessarily exacerbated by the current mode of zealous advocacy. Precisely at this time, and because of these circumstances, we are called on to reduce and promptly resolve disputes to facilitate the necessary transition. More attention needs to be paid to obtaining a fair and equitable result and not simply to winning.

In 1991, President Bush issued an Executive Order that reiterated some of the preexisting policies outlined here.<sup>25</sup> The President cited the burden that civil litigation imposes upon the court system, the high cost both to plaintiffs and defendants, and the wastefulness of litigation practices that prolong the resolution of disputes. The President therefore declared that the United States must set an example for private litigation by adhering to *higher* standards than those required by the rules of procedure in the conduct of government litigation in federal court, and issued guidelines to promote just and efficient government civil litigation, including admonitions to pursue actively settlement opportunities and to explore alternative dispute resolution. The stated goal is "to facilitate the just and efficient resolution of civil claims involving the United States government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector."<sup>26</sup>

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[t]he duty defined in this Rule [to represent the organization and not individuals] applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. . . . Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.

**MODEL RULES OF PROFESSIONAL CONDUCT** Rule 1.13cmt. (1983).

<sup>25</sup> Exec. Order No. 12,778, 3 C.F.R. 359 (1992).

<sup>26</sup> *Id.*, 3 C.F.R. at 360. Pursuant to the Executive Order, the Justice Department has issued implementing guidance, which emphasizes the need for counsel to evaluate and pursue settlement possibilities whenever possible. It also encourages resolution of claims through informal procedures rather than structured Alternative Dispute Reso-

If we are to preserve the defense industrial and technology base, procurement lawyers will be called on to look for the fair and just result and to resolve matters with minimal litigation. There is a direct link between survival of defense contractors and how quickly and fairly we can resolve disputes.

## VII. Liability of Procurement Attorneys in the 1990s

### *A. Liability of Attorneys in Private Practice*

Recent suits by clients and regulatory agencies against law firms have made us all very much aware of the vulnerability of lawyers to actions alleging malpractice. Moreover, the heavy-handed method in which Office of Thrift Supervision (OTS) handled the Kaye, Scholer litigation tells us that we may not always be able to count on due process. I make no brief for the alleged actions or inactions of Kaye, Scholer in that situation. I do, however, strongly disagree with the way in which OTS forced a settlement. I hope that is the last example we see of such use of raw power.

Nonetheless, we are all now sensitized to the exposure for mistakes. What mistakes might we make in the era of downsizing? I am afraid they are numerous. Of course we have the garden variety mistakes that we have always guarded against. Examples include releasing claims inadvertently, missing dates for filing notices of appeal, and failure to make other filing deadlines.

Separate from these areas of mistakes, we have vulnerability to sanctions under Rule 11 for filing or maintaining frivolous actions. We are seeing more activity under Rule 11 in recent years and can expect that trend to continue.

Looking to areas of future potential liability for those of us in the private sector, I would focus on the area of due diligence. As lawyers in private practice take on compliance reviews or reviews for due diligence prior to an acquisition, they are exposed to the risk that they may not discover wrongdoing or liability. We will face the questions of whether lawyers should have discovered potential liabilities if they were exercising the due care required of a member of the profession in those circumstances.

### *B. Potential Liability of Government Attorneys*

Similarly, government attorneys face potential exposure to sanctions and charges of negligence. We are now seeing cases where

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lution (ADR), or use of ADR where it will contribute materially to the prompt, fair, and efficient resolution of claims. 57 Fed. Reg. 3640 (1992).

the actions of government attorneys are being challenged (and sanctioned) under Federal Rule of Civil Procedure 11. The risk of disciplinary proceeding against individuals also is very real.

Moreover, government attorneys who pursue baseless litigation may subject themselves to liability in damages to the targets of such litigation. Thus, one of the risks faced by government attorneys who fail to act with due care in executing their responsibilities is that the individual attorney and/or the government may be held liable for falling below the applicable standard of professionalism. Courts have held that the government is not immune from sanctions under the provisions of Rule 11. The Equal Access to Justice Act (EAJA) provides for the assessment of costs and fees against the government where any other party would be liable for such costs and fees under the common law or under the terms of a specific statute. The Ninth and Tenth Circuits have found that Congress waived sovereign immunity from Rule 11 sanctions by enacting the EAJA.<sup>27</sup>

Furthermore, another avenue for imposing liability based on the negligence of government attorneys may exist under the Federal Tort Claims Act (FTCA). Although the FTCA expressly prohibits suits against government attorneys for malicious prosecution, liability may still arise from *negligent* acts of government attorneys. Such an action could be predicated on a recent decision in a lawsuit brought by General Dynamics. That case grew out of a contract between General Dynamics and the Department of the Army for the development of the Divisional Air Defense System (DIVADS). The Defense Contract Audit Agency (DCAA) performed an audit, which erroneously concluded that General Dynamics had fraudulently mischarged approximately \$7.5 million of DIVADS contract costs. As a result of the erroneous report, a grand jury indicted the company and four individuals, and the government filed a civil suit under the False Claims Act.

General Dynamics later sued the government under the FTCA for damages, alleging negligence on the part of the auditors. The district court has denied the government's motion to dismiss the case, finding that DCAA auditors could be held liable for professional malpractice since the auditing function can be distinguished from the kind of discretionary function which would fall within an exception to FTCA jurisdiction.<sup>28</sup>

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<sup>27</sup> Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988); United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1988).

<sup>28</sup> General Dynamics v. United States, No. CV 89-6762 JGD, 1990 WL 267366 (C.D. Cal. Nov. 7, 1990).

To the extent a government lawyer is negligent in the performance of nonprosecutorial or nondiscretionary duties, the government and/or the attorney may be held liable for professional malpractice in states where an attorney-client relationship is not a prerequisite to bringing a claim of malpractice. Even apart from the tort of malpractice, the government has been found liable for the negligence of an employee in connection with a contract, which results in damage to another party.<sup>29</sup> Thus, a showing of the elements of malpractice may not be required.

The potential of such liability for procurement attorneys is slight, because so much professional judgment and discretion is vested in attorneys. The risk also is reduced by continuing education of the type represented by this impressive annual review by The Judge Advocate General's School. However, when it occasionally may become apparent to a government attorney that the government's present course of action is totally wrong as a matter of law, what will the attorney do? Can he or she accept the client's judgment, or must he or she advise the client in writing that the action is illegal or manifestly unfair? As companies that are hurt and hurting look around for someone to blame, private attorneys may not be the only targets.

On the other hand, if we follow Homer Cummings' example, and seek the just result, we will never be in that position.

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<sup>29</sup> See *Martin Leasing, Inc.*, PSBCA No. 3063, 92-2 BCA ¶ 24,855.



## BOOK REVIEWS

### THE TEMPTING OF AMERICA\*

REVIEWED BY MAJOR DANIEL P. SHAVER\*\*

The common tendency of a public decision maker to aspire to utopia often will entice a judge to elevate the desire to attain results that he or she believes to be valuable to society above the need to make decisions that conform to the letter of the law. Moreover, the members of society, knowing that an appellate judge harbors the substantial power to interpret—and make—the law, understandably will not hesitate to exploit that tendency. These are Judge Robert H. Bork's principal theses in his book, *The Tempting of America*.

Judge Bork asserts that America's judicial system has become inured to a form of heresy by which judges regularly eschew the original meaning of the Constitution and create new renditions of the document to accommodate moral and political agendas. As a result, judges not only abandon their functions as independent arbiters of what the law is, but also improperly interfere with the legislative process by determining what the law should be. Furthermore, Judge Bork points out that the persons who comprise the legal profession's intellectual class—that is, law school faculty members and legal commentators—largely have welcomed the judiciary's practice of infidelity to the archetypical paradigm of constitutional law. With overtures of cynicism, he reminds the reader that, because creating case law entails academic manipulation, the intellectual class actually has become empowered by the practice of judicial legislation. Judge Bork argues that the ability of scholars to influence judges effectively circumvents the process of popular lawmaking. Accordingly, instead of founding law upon the will of the majority, interest groups conveniently can enlist the judiciary to adapt the Constitution to their own agendas. Judge Bork spares judges from much of the blame for this problem. Instead, he cites society's desperation for immediate results, and the willingness of people to use courts as mechanisms to facilitate political change, as significant threats to the Constitution's integrity. Not surprisingly, the most remarkable symptom of this danger that the author addresses is the politicization of his own Senate confirmation hearings as a nominee for Associate Justice to the United States Supreme Court.

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\* ROBERT H. BORK, *THE TEMPTING OF AMERICA* (Simon & Schuster 1990).

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The author's style is graceful and uncomplicated. His analysis, however, is tremendously insightful and thought provoking. In essence, Judge Bork critically reviews every major constitutional Supreme Court decision since *Marbury v. Madison*. Amazingly, in virtually every case, he raises one or more legal issues that the Court analyzed unartfully or incorrectly. He explains how the justices often have ruled improperly by torturing the meanings of constitutional provisions. More importantly, he describes how the justices frequently have relied on wrong or inapplicable constitutional provisions to arrive at correct decisions.

One of Judge Bork's accounts is particularly compelling: his analysis of *Brown v. Board of Education*. The author argues that the result in *Brown* was good, but that the legal reasoning manifested by the Court's opinion was bad. The Warren Court founded the *Brown* decision on the Fourteenth Amendment Equal Protection Clause. That clause, however, had tolerated racial segregation under the guise of separate-but-equal education facilities for over fifty years. Accordingly, the Warren Court had to abandon the original meaning of the Equal Protection Clause to justify its decision. In effect, the Court rationalized its decision predominantly by referring to social science studies that evidenced the substantial psychological harm that segregation imposed on black school children. The author never disputes that the *Brown* Court was correct; rather, he contends that the Court did not have to jettison the original purpose of the Equal Protection Clause to arrive at its decision. Instead, the Court merely could have ruled that the "separate-but-equal" concept had failed to produce the equality that the drafters of the Fourteenth Amendment had desired. Consequently, segregation actually violated the original purpose of the clause—namely, equality before the law.

Bork criticizes the Warren Court for venturing into policy making when the Constitution offered a firm legal basis for the same decision. Significantly, he exemplifies the *Brown* decision as the case that opened the floodgates of judicial activism. Once the academicians in the legal community were satisfied that the nation would not question a Supreme Court ruling that effectively constituted a proclamation of public policy, they had a new incentive to use all courts as forums for social change. This incentive spilled over to the American people, tempting them to employ the judicial branch to effect political change by urging it to redefine constitutional principles to satisfy special interests.

Significantly, the temptation about which Judge Bork admonishes American society is equally attractive to all public servants—including judge advocates. As officers and lawyers, the Army often places on us the responsibility to make decisions founded on sound,

deliberate, and impartial judgment. Such decisions must be faithful to the law, not only because we are bound to defend it, but also because—as Judge Bork would argue—any decision *not* based on law necessarily manifests a personal judgment instead of a legal one.

*The Tempting of America* is a provocative and well-written dissertation that chastises the transformation of the judiciary from an independent, process-oriented branch to a politically influenced, results-oriented government institution. Whether or not the reader agrees with his conclusions, Judge Bork's arguments and analyses provide considerable food for thought.

## COLD WAR CASUALTY\*

REVIEWED BY MAJOR FRED L. BORCH\*\*

In creating the Uniform Code of Military Justice (UCMJ) in 1950, Congress decided that commander involvement—in selecting court members, in referring courts-martial to trial, in approving findings and sentences—was proper and necessary. Congress understood, however, that a commander desiring a particular court-martial result might use these lawful powers to improperly influence the court-martial process. Consequently, to guard against such command influence, Congress made it illegal under Article 37, UCMJ to “coerce or, by any unauthorized means, influence the action of a court-martial.” Despite this provision, unlawful command influence occurs from time to time in the military justice system. Judge advocates interested in an early command influence episode will want to read *Cold War Casualty*, the story of the 1952 general court-martial of Major General (MG) Robert W. Grow.

Major General Grow, an experienced soldier who commanded the 6th Armored Division during the Battle of the Bulge, was the senior military attache in Moscow in 1951. He kept a diary, into which he made a number of “impolitic” personal observations. Unfortunately for MG Grow, a Soviet agent photocopied portions of

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\* GEORGE F. HOFMANN, *COLD WAR CASUALTY* (Kent State University Press 1993); 251 pages (hardcover).

\*\* Judge Advocate General's Corps, United States Army. Currently assigned as a Student, United States Army Command and General Staff College, Fort Leavenworth, Kansas.

the diary. When these were combined with some forged diary passages, and distributed to the press, MG Grow emerged as a “maniac” who “was part of an international conspiracy to unleash a new world war” against the Soviet Union. Given MG Grow’s role in Moscow, many in the Western media, particularly the influential *Washington Post*, believed the propaganda. Moreover, some in the Army believed that MG Grow’s diary contained classified information. Consequently, its copying by a Soviet agent had compromised security, and made Grow guilty of violating an Army regulation prohibiting the unauthorized disclosure of classified information. The end result was that Grow’s superiors decided to court-martial him for these unauthorized disclosures, but Grow “welcomed the proceedings as a path to vindication.” He was not, however, cleared of wrongdoing. Instead, MG Grow was convicted at a general court-martial, and sentenced “to be reprimanded and to be suspended from command for a period of six (6) months.”

In detailing the court-martial of MG Grow, author George Hofmann shows that Grow’s defense counsel were unable to present the vigorous defense expected in court-martial practice today. They were denied the opportunity to travel to Europe to interview witnesses, and repeatedly were prohibited from examining documents and obtaining other necessary and material evidence. Hofmann suggests that this reflects the unlawful command influence exercised by the Army Staff, particularly the Deputy Chief of Staff, Lieutenant General (LTG) Maxwell Taylor. Taylor, writes Hofmann, was involved intimately in the Grow court-martial because he personally disliked Grow (the latter had criticized Taylor’s performance in the Battle of the Bulge), and because politically it was expedient to court-martial MG Grow given the “intolerance, political extremism, and uncertainty produced by the Cold War” of the early 1950s. Hofmann also suggests that Taylor selected court-martial panel members who would understand that a finding of guilty was more important than a “fair” trial. The proceedings also were classified, which closed them to the press and the general public. All this, claims Hofmann, is proof of unlawful command influence, and it makes interesting reading.

*Cold War Casualty* is persuasive as long as it concentrates on the facts and circumstances surrounding the Grow court-martial, and evidence of unlawful command influence in the case. Author Hofmann’s explanation of institutional change in the Army, however, misses the mark. He writes that Grow’s prosecution is “an example of managerial careerism exercised by the Army Staff in the Pentagon using the military justice system as a tool for unlawful command influence, causing political interests to usurp the judicial process.” Hofmann contends that the rapid expansion of the Army in World War II caused it to emphasize business management tech-

niques at the expense of “traditional military values.” This meant that “‘managerial careerism replaced ethical responsibilities based on service and sacrifice.” In MG Grow’s case, the Army staff, led by a biased LTG Taylor, allegedly placed its “self-interest over service” in deciding to prosecute MG Grow. Careerism took precedence over doing the right thing. In Hofmann’s view, an Army guided by its traditional military values would have permitted MG Grow to quietly retire instead of face the “‘indignity’ of a military trial by his peers.” To add insult to injury, unlawful command influence deprived MG Grow of a fair trial. This is a serious accusation. Hofmann, however, provides *no evidence* to support this claimed organizational change. Additionally, if Hofmann is correct, then general officers and other senior participants in the Grow proceedings had a truly amazing metamorphosis when they abandoned their prewar “traditional military values” to embrace post-World War II “managerial careerism.”

*Cold War Casualty* also shows a lack of understanding about military justice—particularly the role of the commander in the system. The book rightly emphasizes the evils of unlawful command influence. It also correctly claims that it still occurs in some cases. But *Cold War Casualty* fails to explain why commanders play an active role in the military criminal justice system. Consequently, the reader never learns that the UCMJ promotes both discipline and justice, and that Congress gave commanders significant authority under the UCMJ to insure that discipline remained a part of the court-martial process. An explanation of the role of commanders in the system does not excuse unlawful command influence, but it does better explain *why* it continues to occur. These criticisms aside, *Cold War Casualty* will appeal to judge advocates with an interest in legal history.

## THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW\*

REVIEWED BY JOHN E. PARKERSON, JR. \*\*

John Woodliffe, Senior Lecturer in Law, Leicester University, filled a tremendous void in international legal literature with his new book, *The Peacetime Use of Foreign Military Installations Under Modern International Law*.<sup>1</sup> This well-written and meticulously researched study is the first comprehensive account of status of forces law in over twenty years. The closest rival is Serge Lazareff's *The Status of Military Forces under Current International Law*,<sup>2</sup> from 1971, which focused on the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA).<sup>3</sup> Unfortunately, Lazareff's excellent study is outdated in many respects and is now out of print.<sup>4</sup> Partly as a consequence, research on status of forces law—usually done in the course of negotiations for new or amended stationing rights—has been piecemeal. Students, advocates, and practitioners of international law desperately needed a replacement. Woodliffe's new study answers that need. With its case studies and comparative analysis of status of forces agreements worldwide, it provides valuable specific information for the military and civilian practitioner and lessons in international agreements generally. With its many interesting examples and readable narra-

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\* JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW*, Martinus Nijhoff Publishers (1992); 368 pages; \$118.00 (Hardcover).

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<sup>1</sup> JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* (1992).

<sup>2</sup> SERGE LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* (1971). For an early study on the law pertaining to foreign criminal jurisdiction, see JOSEPH M. SNEE, S.J., and A. KENNETH PYE, *STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION*. An excellent early source for status of forces law is GEORGE STAMBUK, *AMERICAN MILITARY FORCES ABROAD* (1963).

<sup>3</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

<sup>4</sup> Of the military services in the Pentagon, only the Navy legal office possesses a copy of Lazareff. Yet, the plurality, if not the majority, of status of forces issues pertaining to NATO arise within the Army, which has the largest number of military installations in Europe among the United States military services. The Pentagon Library does not possess a copy.

tive, it provides an equally fascinating history of a little-known area of the international law applicable to military forces.

The status of forces system that Woodliffe analyzes likely will remain in place well into the foreseeable future. Regardless of overseas drawdowns and other current factors affecting the size and location of our military forces in foreign countries, overseas stationing of military forces undoubtedly will continue. Most of the basic issues that must be resolved by agreements pertaining to the status of those forces on foreign territory will change little. Although the book is contemporary, Woodliffe's subject—like international law generally—is undergoing continuous change.

Woodliffe's chief contribution is the systematic approach that he takes in analyzing his subject.<sup>5</sup> As with any "system," this approach permits the examination of the subject in a flexible manner, as changing factors produce varying results.<sup>6</sup> Woodliffe recognizes that events precipitate changes in the law; but he convincingly illustrates that the underlying status of forces structure remains relatively constant. He correctly divides this underlying structure into its two principal components: "The Legal Framework in Context" (Part I) and "Legal Relations Inter Partes" (Part II). The latter pertains to the subject areas covered by agreements: criminal jurisdiction, civil claims, installation security, provision of installation sites, access and freedom of movement, overflight and maneuvers, and others. The "legal framework" addresses how agreement provisions within those subjects are shaped by general international legal principles, recognizing the collateral influences of various domestic and international political forces that give meaning to the application of the legal principles. This framework focuses on the interre-

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<sup>5</sup> Woodliffe states:

Hitherto, the legal literature on the subject of foreign military installations has focused almost exclusively on the treatment under status of forces agreements of questions of criminal jurisdiction and settlement of civil claims arising out of the activities of visiting armed forces. The present study aims to dispel this narrow perspective and to show, in a systematic way, the relevance of the subject to a wide range of international law issues . . .

Woodliffe, *supra* note 1, at 11.

<sup>6</sup> See generally Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 A.J.I.L. 205 (1993). This short essay includes a description of international relations theory and its relationship to international law. Ms. Burley's message is that "international lawyers can ill afford to ignore the growing wealth of political science data on the world they seek to regulate [and that] . . . [i]n the end, law informed by politics is the best guarantee of politics informed by law." *Id.* at 239. For greater discussion of international relations systems theory, see generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); *CON-TENDING THEORIES OF INTERNATIONAL RELATIONS* 134-80 (James E. Dougherty & Robert L. Pfaltzgraff eds., 2d ed. 1981).

lated principles of sovereignty, consent, and nonextraterritoriality. Woodliffe places the legal framework in its historical context and explains how it has been affected in particular instances by postwar occupation, the legacy of colonialism, international principles concerning property rights—such as, leases and servitudes—and the numerous international legal restrictions on the freedom to establish military installations.

Woodliffe takes the process further in Part III: he steps outside the analysis of how internal and external factors affect the system, and examines the legal effect of the system on third parties. As case studies, Woodliffe uses a series primarily consisting of well-known military operations staged from—or to some degree involving—foreign installations to illustrate how the principles of state responsibility and neutrality apply to the “peacetime” use of foreign military bases. Here too, Woodliffe finds a changed environment, as illustrated by the United States forces’ raid against Libya in April 1986. States hosting foreign forces are becoming increasingly reluctant to allow their bases to be used in military operations that affect some legally protected interest of a third state. This is particularly true where the operation falls outside the installation’s purported mission that forms the basis of the host nation’s consent to the foreign forces’ presence or use of the installation.

Like Lazareff before, Woodliffe concentrates on Europe specifically, the system exemplified by the **NATO SOFA**. This is understandable for a number of reasons. The **NATO SOFA** serves as a model against which successive agreements continue to be examined and created. Its foreign criminal jurisdiction, claims, customs, tax, and other provisions are found in similar form in most of the more sophisticated agreements where a long-term presence of foreign forces is contemplated. The same can be said of the basic underlying political forces and broad international legal principles: they, too, exert influences on the system in similar fashion. The **NATO SOFA** endures as the system’s basic model proving the system’s legitimacy and constancy.

Woodliffe describes in the Preface—and elaborates in his final chapter—the events, largely in Europe, that are causing the evolution of law in the field. By recognizing these events as inputs, or influencing factors, within the status of forces system, one can better understand how a state acquires its negotiating positions, how resulting agreements will look and, consequently, how the law in this field develops generally. **SOFAs** are just one of innumerable areas of international law affected by changing events. Most importantly, while the basic **SOFA** framework remains constant, the particular rights and obligations found within those agreements’ provisions are

taking on different characteristics. These characteristics are shaped, in turn, by the legal and political changes occurring not only within the states that are party to the agreements, but also by the greater international climate that affects those countries' reactions to changing events.

As threats to states' security occur in different forms, the SOFAs that support the collective security arrangements requiring the stationing of foreign forces evolve in tandem. With receding external threats, the host nation perceives less necessity for the stationing of foreign forces in its territory and for the granting of special privileges to those forces. Consequently, internal factors gain a greater proportion of influence. The host nation, responding to internal pressures—such as public opinion—or evolving notions of its own sovereignty and, to a lesser degree, to external pressures to become less “aligned,” consequently accrues significant political leverage with respect to visiting forces. The result often is a critical reappraisal of existing agreements or, where new SOFAs are being sought, more difficult bargaining for the potential sending state. In the NATO context, the new multilateral amendments to the 1959 German Supplementary Agreement to the NATO SOFA<sup>7</sup> are the most recent manifestation of these developments. In bilateral United States relationships, our government is experiencing more difficult and complex bargaining in connection with status of forces negotiations as host nations closely scrutinize their underlying relationships with the United States. This trend is illustrated by recent or ongoing negotiations with Persian Gulf States for access and prepositioning agreements; with individual NATO allies for bilateral supplemental arrangements; and with States such as the Philippines, where, by mid-1992, the financial and political stakes linked to the bargain for retaining United States bases became unacceptably high.

It is this changing international environment, viewed against the status of forces system, that makes Woodliffe's work so relevant

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<sup>7</sup>Agreement to Supplement the Agreement between the parties to the North Atlantic Treaty regarding the Status of their Forces with respect to foreign forces stationed in the Federal Republic of Germany, with Protocol of Signature, August 3, 1969, 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter German Supplementary Agreement]. Both this agreement and the NATO SOFA, *supra* note 3, entered into force for the Federal Republic of Germany on July 1, 1963. Bundesgesetzblatt [BGB1] 1963II S. 745 (F.R.G.). The new amendments to the German Supplementary Agreement were signed in Bonn, Germany, on 18 March 1993 by representatives of the German Government and the six NATO sending states: the United States, the United Kingdom, France, Canada, the Netherlands, and Belgium. Agreement to Amend the Agreement of August 3, 1959, as Amended by the Agreements of October 21, 1971 and May 18, 1981, to Supplement the Agreement between the parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany. Although an executive agreement in the United States, the amendments will not become effective until ratified by each signatory according to its constitutional requirements. This is expected to take several months.

today. The emphasis is properly placed on sovereignty—that is, whether particular SOFA grants constitute derogations or transfers of rights. From the perspective of sovereign rights—the heart of the system—the components of the system easily fall into place, and the implications of legal status may be examined. Each component of the examination—consent, the juridical nature of rights created under base agreements, the legal frame of reference applicable to sending state-receiving state relations, criminal jurisdiction and civil claims, responsibility for installation security, and others—ultimately leads back to sovereignty.

Although Woodliffe raced against time to incorporate evolving European events, his book arrived too soon to take account of the new, 1993 German Supplementary Agreement amendments. These status of forces amendments should attract considerable interest among potential or current host and stationing nations as examples of the kinds of bargains that might be struck in the current international climate. For that reason, and also because the changes illustrate how the status of forces system responds to changing events, a brief summary of its more important aspects is warranted here. A formal review of the German Supplementary Agreement began in Bonn, Germany in September 1991 at the request of the German Government. It was not until the last week of December 1992 that negotiators produced texts upon which they could agree. Significantly, the “revisions” reflect the growing counterbalancing trend among nations hosting visiting forces to reassert their sovereignty as the perceived need for protection (or contributions to their security) by foreign forces is reduced.

The factors that led to the Federal Republic of Germany’s reassertion of sovereign rights are illustrative. With reunification and a concurrent perception of diminished threats to its national security, the German Government saw a need to change the political and legal framework governing the Allied stationed forces. An additional factor was the widespread feeling that foreign forces on German territory were acting as occupying powers rather than pursuant to considerations for German sovereignty and law. Consequently, the German Government desired changes to the existing legal regime that would reemphasize its complete sovereignty over its internal and external affairs. New provisions would go beyond the current requirement that visiting forces “respect” German law, and would more closely approximate full application of German law to the activities of foreign forces and their personnel.<sup>8</sup> The NATO forces stationed in Germany recognized the changed environment and

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<sup>8</sup> See *Germans Seek Limits on Western Forces*, WASH. POST, July 4, 1992, at A16, col. 5.

were willing to make concessions in the interest of preserving friendly and cooperative relations between allies and, of course, continued stationing rights in a still strategically important region of the world. They were willing to negotiate solutions to minimize irritants attributable to the presence of *so* many foreign forces in Germany, consistent, on the other hand, with preserving the ability of visiting forces to perform military missions effectively without significantly affecting either costs *or* quality of life.

Closely tied to the bargain was the German quest for "equality" in rights and privileges, manifest in the strong German desire for reciprocal obligations—an element that was perceived as missing from United States-German relations in particular. Because the original 1959 Supplementary Agreement is nonreciprocal (it applies only in Germany) and, for the United States, an executive agreement, all sides recognized that reciprocal amendments would require the parties to conclude a completely new, more formal, agreement.<sup>9</sup> This reciprocity dilemma is resolved, to some extent, by a United States-German side letter assuring the Germans that, on their request, the United States Government will consider making arrangements with the Federal Republic that provide rights comparable to those given the United States forces stationed in Germany.

As expected, the subjects that are most closely associated with sovereignty were the focus of these recent negotiations with Germany: labor, environment, the military death penalty, maneuvers and training, construction, vehicle licensing and safety standards and procedures, service of civil and criminal process, and others.<sup>10</sup> The first three areas—labor, environment, and the death penalty—became particularly contentious areas of negotiations. The revisions are trend-setting and illustrative of current international focus and developing international norms in many respects. New labor provisions redefine the areas subject to codetermination, and German workers receive a greater role in labor dispute resolution. The 1959 Supplementary Agreement did not have an article specifically addressing the environment, but new provisions making explicit the visiting forces' responsibilities in the areas of environmental practices and clean-up reflect a growing international concern over the

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@Aside from the political implications and the great difficulty in negotiating a reciprocal agreement among *all* parties to the Supplementary Agreement, United States constitutional implications—*federalism* and fiscal issues among them—likely would require a treaty instead of an executive agreement.

<sup>10</sup> See generally *U.S. Forces in Germany Will See Few Changes Under New Pact*, *STARS & STRIPES* (Europe), Jan. 22, 1993, at 1, col. 1. The title is a misleading assessment of the amendments. The article is written to assure United States soldiers, civilian employees and dependents that, *as* individuals, they will notice few changes in quality of life under the revised agreement.

environment. The death penalty for the first time is singled out in a new article as a punishment that merits particular attention. It generally preserves the visiting forces' right to hold capital trials in Germany as a matter of law, but limits the ability to adjudge a sentence of death within Germany. This latter development brings visiting forces' available punitive sanctions for particularly egregious crimes closer in line with those of Germany, but it also reflects developments in international human rights law that are viewed with especial emotional and political sensitivity in most European NATO member states.<sup>11</sup> Other new arrangements concerning maneuvers and training ensure that visiting foreign forces are less visible, that the German Government has greater control over these matters, and reflect an increased concern on each side for aspects of visiting foreign forces' training that affect German citizens' "quality of life."

These significant changes in visiting forces-host nation relationships with respect to Germany, and their implications for future stationing rights and obligations elsewhere, are understood more easily from the systemic, global perspective taken by Woodliffe. He begins his study by discussing the principle of consent. Woodliffe asserts that the lawfulness of the presence of foreign forces on a host nation's territory is contingent on the host's consent. He adds, however, that agreements qualify consent by requiring, for example, joint consultation or that foreign military activities be taken only in furtherance of NATO objectives. Woodliffe then examines how wartime occupation affects consent. He observes that international law permits the stationing of foreign forces in a defeated aggressor state, pending the full restoration of peace, without violating the principle of consent. The consent issue, however, arises when wartime occupation transitions into genuine peacetime stationing. In this connection, Woodliffe analyzes the cases of Germany and Japan to explain the effects of occupation on current status of forces provisions and as motivators for reexaminations of these agreements for possible termination or revision. Germany perceived the rights attained by stationed forces as not having been "conferred" by the Federal Republic. Woodliffe suggests that Japan, with its distinct history of occupation and different set of geo-political circumstances, obtained a closer approximation of equality earlier than did Germany.

The following three chapters relate the principle of sovereignty to stationing agreements. Woodliffe introduces the axiom that a host nation is exercising, not abandoning, its sovereignty by assuming

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<sup>11</sup>See generally John E. Parkerson & Carolyn S. Stoehr, *The Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41 (1990); Steven J. Lepper, *Short v. The Kingdom of The Netherlands: Is it Time to Renegotiate the NATO Status of Forces Agreement?*, 24 VAND. J. TRANSNAT'L L. 867.

obligations under an international agreement that restricts its sovereignty. The corollary, he states, is the *presumption* that states intend to establish rights and duties on the basis of equality and reciprocity. He explains, however, that sovereignty is a “relative concept,” it rarely exists *in fact*, as states are disparate in economic, political, and military powers. In this context, Woodliffe examines the validity of stationing agreements under the so-called “doctrine of unequal treaties.” Through a series of examples of United Kingdom (Cyprus), French (Bizerta), and United States (Guantanamo) practices, Woodliffe shows that the sovereignty of states rarely has been challenged successfully on the grounds that continuing military base arrangements with its former colonial power nullified the transfer of sovereignty. He concludes that the doctrine of unequal treaties is not particularly valuable because the issue of lack of consent in the creation of particular military base agreements can be addressed adequately through clearly existing law of treaties and law of state succession.

Given that a state generally is free to pursue security arrangements as it sees fit, Woodliffe examines the relatively narrow range of restrictions imposed by international law on this freedom. He discusses the rules concerning self-governing territories as they evolve toward independence (historical examples of Namibia, British Indian Ocean Territory, Strategic Trust Territory of the Pacific Islands). He also discusses the rules of the *res communis* (high seas, outer space, moon and other celestial bodies), and other miscellaneous cases (demilitarized territory, neutral and neutralized states, Antarctica, and agreements or policies regulating the transfer or location of nuclear weapons). Finally, Woodliffe looks at stationing agreements from the perspective of property rights—such as, leases and servitudes—which assist in defining the degree of permanency of the arrangements and the extent of conferred rights and obligations assumed. He concludes that, while SOFAs constitute derogations from, or restrictions on, a state’s sovereignty, they generally do not effect a transfer of proprietary rights to the visiting force’s state.<sup>12</sup>

Woodliffe then departs from the legal framework and examines the legal relations between the parties. He begins with the general recognition that while the host nation guarantees quiet enjoyment of the visiting force’s user privilege, the territorial sovereign retains the right to regulate the privilege. He explains the agreement mechanisms that assist the host nation in ensuring that the sending state

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<sup>12</sup>The discussion of the “federalist view of NATO” from the perspective of its degree of integration, and whether rights conferred thereunder are transfers or derogations of sovereignty, is especially interesting. Woodliffe, *supra* note 1, at 123–27.

abides by its obligation to exercise its rights and powers in a "reasonable" manner: standard clauses concerning the provision of sites, access to and freedom of movement within the host nation, on- and off-site rights and powers; and regulation of such matters as overflight, maneuvers, and provision of services and utilities.

Certain specific subject areas of particular importance to the legal relations between the parties receive special attention: criminal jurisdiction, installation security, and civil claims. Woodliffe observes that the "distinctive legal feature" of SOFAs is the jurisdictional power accorded the visiting force, allowing it to exercise extensively its own system of criminal justice on the host nation's territory with respect to its own personnel. He focuses on the NATO SOFA as the model for resolving potential conflicts between the two interested states, theoretically giving the right to exercise jurisdiction to the state that has the predominant interest in the case.<sup>13</sup> This scheme generally works well, but, as pointed out earlier with respect to the revisions to the German Supplementary Agreement, problems increasingly surface when a visiting force's soldier is accused of a capital offense that carries the potential for imposition of a death sentence. Woodliffe illustrates through his summary of *The Netherlands v. Short* the friction that can result between SOFA parties that have not resolved conflicts over issues as sensitive as the death penalty. In *Short*, criminal jurisdiction procedures allowing the visiting state (the United States) to prosecute seemingly conflicted with other treaty obligations of the host nation (the Netherlands) that prevented death sentences within that state's jurisdiction.<sup>14</sup> The chapter on security of installations reemphasizes consent, sovereignty, and nonextraterritoriality. Woodliffe notes the host nation retains primary responsibility for protecting the visiting forces in its territory. The rights granted the stationed force with respect to its police powers are limited consistent with these principles.

As the final subject area, Woodliffe includes an excellent discussion of legal inroads made by SOFA claims provisions into traditional notions of sovereign immunity. The subject of claims is receiving greater attention as host nations become more sensitive to damages caused by maneuvers and other environmental effects of foreign forces' activities.<sup>15</sup> Generally, with respect to damage,

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<sup>13</sup>See NATO SOFA, *supra* note 3, art. VII.

<sup>14</sup>See *supra* note 11. A more accurate summary of the *Short* case is John E. Parkerson & Steven J. Lepper, *Short v. Kingdom of the Netherlands*, International Decisions, 85 A.J.I.L.698 (1991).

<sup>15</sup>See *Germans Question Their Sovereignty*, N.Y. TIMES, Sep. 19, 1988, at A1; Bryan H. Schempf, *Claim Commissions in USAREUR: The Price of Friendship*, ARMY LAW., July 1985, at 17. See *supra* text accompanying note 10. Regrettably, Woodliffe does not discuss these areas of increasing importance.

injury, or death occurring to military property or personnel, sovereign immunity is preserved in the form of intergovernmental mutual waivers of claims. Problems that arise usually concern private third-party claims against the visiting force resulting from acts of its personnel. In these cases, some kind of formula generally will provide a scheme for the visiting force and the host nation to share the responsibility for satisfying the claim. More traditional state immunities survive, however, with respect to claims arising from "private," nonduty conduct.

Woodliffe also covers the legal effects of the relationships between the stationing agreement parties and third states. He focuses on the principle of state responsibility, applying to the stationing relationship the well-known obligation to control sources of danger that threaten harm to third states. Woodliffe examines the alternative standards for determining which state is responsible for harm caused to a third state by a visiting force. The least acceptable alternative, Woodliffe argues, is to hold the host nation—the territorial sovereign—per se responsible for all harm emanating from its territory. The preferred method for determining responsibility for a visiting force's activities instead may depend on the amount of "control" exercised by the host nation over the activities of the visiting force. He notes that the stationing agreement's terms and how they define the visiting force's mission generally indicate the extent of host nation control or complicity—that is, consent—in the visiting force's activities. The greater the degree to which the visiting forces must consult or inform the host nation of the visiting force's activities, the greater the responsibility the host nation possesses with respect to those activities. Woodliffe concludes that a resulting standard of joint responsibility is more appropriate, considering that some element of "complicity" of the host nation in the visiting force's activities usually is present. The author uses several interesting case studies in which a host nation somehow has facilitated the visiting force's conduct to illustrate state practice in this area. Among them are the 1960 "U2" incident (Union of Soviet Socialist Republics (USSR) warnings to Norway, Pakistan and Turkey<sup>16</sup>); the 1980 Iran hostage rescue mission ("complicity" of the United Kingdom and Egypt); British sovereign base areas in Cyprus (numerous objections by the Republic of Cyprus to their use); the 1986 United States air strike against Libya (Libyan protests to the United Kingdom); and the 1973 Yom Kippur War (Portuguese involvement in the transit of United States supplies to Israel).

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<sup>16</sup>Woodliffe quotes the warning given by First Secretary Khrushchev as especially illustrative: "[I]f you lease your territories to others and are not the masters of your land, of your country, hence we shall have to understand it in our way . . . ." Woodliffe, *supra* note 1, at 265.

Woodliffe brings his study full circle with the concluding two chapters, concerning the termination of stationing agreements and the related subject of the future of these agreements in the post-Cold War era. He observes that agreement termination is more a political than a legal issue. The traditional means of termination under the law of treaties apply, generally, through termination clauses or through mutual consent of the parties. Woodliffe illustrates termination as the result of material breach with the 1986 United States-New Zealand dispute over the latter's antinuclear policies in connection with visits by United States warships. In that case, he makes the argument that New Zealand violated the Australia, New Zealand, United States (ANZUS Council) Pact by unilaterally interpreting the treaty so that it could bar visits by ships carrying nuclear weapons. Consequently, the United States used material breach to justify its suspension of the Pact. The case of the 1966 French withdrawal from the NATO integrated military command illustrates the principle of *rebus sic stantibus*. France cited fundamental changes in the world that, in its opinion, no longer justified its continued participation in NATO. For political reasons, France did not want to withdraw from the NATO treaties, and none of the NATO parties wanted a confrontation over France's shaky assertion of the legal principle that it used as the basis for its actions. Consequently, the French withdrawal from the integrated military command was seen as a means to accomplish France's objective without it taking the politically explosive step of terminating its NATO treaty relationships.

Finally, Woodliffe briefly discusses the obligations of the visiting force and the host nation on vacation of installations. He states that the host nation has no general obligation to compensate the visiting force for improvements that the latter made to its facilities. Negotiations to determine residual value—that is, the computation for improvements made, minus factors such as depreciation and damage to the property—increasingly are major elements of the settlement between the agreement parties for the return of installations to the host government.<sup>17</sup> He further adds that the visiting force generally has no obligation to restore property to its preexisting condition. A more current look at developments in this area shows, however, that as a result of increasing host nation concern for the environment, visiting forces are assuming greater obligations to restore installations and to include environmental damage off-sets to residual value determinations on vacating the premises.

The study ends with a discussion of the elements that constitute pressures for change in the post-Cold War stationing agreement

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<sup>17</sup> See, e.g., German Supplementary Agreement, *supra* note 7, art. 52

system. These include emerging technologies; the perceived reduction of external threats to security, together with concomitant demands for economic assistance in exchange for access; sending state economic constraints and the consequent demands for greater burden sharing; host nation nationalism; and new geopolitical realignments in the wake of the Cold War. Despite the pressures, Woodliffe concludes, the United States, *as* the world's superpower, will continue to require a network of "core" facilities to enable it to project military force worldwide. These facilities become increasingly important to support operations in locales such as Iraq, Somalia, and the former Yugoslavia. Numerous important issues spring from these new uses of overseas installations that must be resolved as worldwide missions evolve. The constraints posed by "out of area" operations on use of NATO installations; and the support that existing and future bases can provide to other security bodies such *as* the Conference for Security and Cooperation in Europe, the Western European Union, the European Economic Community and the United Nations; are indicative of the complexities of the evolving status of forces system.

Woodliffe tackled a dynamic area of international law that is responding to a rapidly changing international environment. The system that he describes is sufficiently flexible to accommodate subject areas that are gaining greater attention since Woodliffe completed his study. Future treatises on status of forces law no doubt will place greater emphasis on the environment, labor, training, residual value, and human rights-related issues like the death penalty or rights of accuseds generally. As United States missions evolve and multilateral responses to world crises take on growing importance, permissible uses of foreign bases for previously nontraditional roles will demand more attention. Meanwhile, with the knowledge that the status of forces system operates in a changing environment, Woodliffe's book will serve us well for some time to come.



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